

**OPINIONS
OF THE
ATTORNEY GENERAL
AND
REPORT
TO THE
GOVERNOR OF VIRGINIA
2010**



**COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
RICHMOND**

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LETTER OF TRANSMITTAL

May 1, 2011

The Honorable Robert F. McDonnell
Governor of Virginia

Dear Governor McDonnell:

I am pleased to present to you the *Annual Report of the Attorney General* for 2010. The citizens of the Commonwealth of Virginia may be proud of the dedicated public servants who work for the Office of the Attorney General. I have enjoyed working with them and you over the past year and look forward to continuing to ensure that the Commonwealth has the finest lawyers and staff at the Department of Law to represent the interests of the citizens of Virginia. Although the Office experienced some organizational changes in 2010, those changes in no way hindered the mission of the agency. Rather, it is with great pride that I present to you a small portion of the accomplishments of this Office from the past year.

STATE SOLICITOR GENERAL

The State Solicitor General is responsible for the Commonwealth's litigation in the Supreme Court of the United States, except capital cases, and in all lower court appeals involving constitutional challenges to statutes or other high profile matters. In addition, the State Solicitor assists all Divisions of the Office with constitutional and appellate issues. In 2010, the State Solicitor was successful in challenging the federal health care law in the United States District Court in *Commonwealth v. Sebelius*. The section briefed and argued *Virginia Office of Protection & Advocacy v. Reinhard* in the United States Supreme Court, which addressed the propriety under the Eleventh Amendment of a state agency suing the state in federal court. Additionally, the Solicitor participated in a challenge to the EPA's regulation of "greenhouse gases," successfully resisted an important Confrontation Clause challenge in the Virginia Supreme Court, and successfully defended against a number of petitions for certiorari in the United States Supreme Court. Finally, the merits brief filed in the United States Supreme Court in *Briscoe v. Virginia* earned a "best brief" award.

CIVIL LITIGATION DIVISION

The Civil Litigation Division defends the interests of the Commonwealth, its agencies, institutions, and officials in civil law suits. Such civil actions include tort, construction, employment, workers' compensation, Birth Injury Fund claims, debt collection matters, and civil rights claims, as well as constitutional challenges to statutes. The Division also handles cases involving the commitment or conditional release of sexually violent predators. The Division contains the Division of Debt Collection, which is responsible for providing all legal services and advice related to the collection of funds owed to the Commonwealth. In addition, the Division pursues civil enforcement actions

pursuant to Virginia's consumer protection and antitrust laws, represents the interests of the citizens of the Commonwealth with regard to the conduct of charities, and serves as Consumer Counsel in matters involving regulated utilities, including cases pending before the State Corporation Commission. Finally, the Division provides legal advice to the agencies and institutions of state government on risk management, employment, insurance, utilities, and construction issues and serves as counsel to Virginia's judiciary and the Virginia State Bar.

Trial Section

The Trial Section of the Civil Litigation Division handles most of the civil litigation filed against the Commonwealth. The cases defended include tort claims, civil rights issues, contract issues, denial of due process claims, defamation claims, employment law matters, election law issues, Birth Injury Fund claims, Freedom of Information Act challenges, contested workers' compensation claims, and constitutional challenges to state statutes. The Section also represents the Commonwealth in matters involving Uninsured Motorists/Under Insured Motorists and the Birth-Related Neurological Injury Compensation Program. The Section also provides support to the Solicitor General's office on major litigation, such as the healthcare suit and any suits that arise out of the decennial redistricting. The Trial Section consists of three Units: General Trial Unit, Employment Law Unit, and Workers' Compensation Unit.

General Trial Unit

The General Civil Unit provided legal advice to state courts and judges, the Virginia State Bar, the Virginia Board of Bar Examiners, and the Department of Labor and Industry, and participated in the annual training of newly appointed district and circuit court judges. The Unit represented the Virginia State Bar in 23 matters, including 13 attorney disciplinary appeals before the Supreme Court of Virginia, and prosecuted 3 persons for the unauthorized practice of law. In 2010, the Unit received 266 new suits.

Significant cases of 2010 include the continued defense of Virginia Tech in the wrongful death suits filed by two families as a result of the April 16, 2007 shootings. In January 2010, the court dismissed all of the Virginia Tech defendants except for the President and Executive Vice President. Subsequently, plaintiffs filed additional suits against two of the dismissed defendants, the Virginia Tech Chief of Police and the University Counsel, who we are defending. Trial is set for September 26 – October 7, 2011. The Unit is also defending Virginia Tech in a suit arising from the murder of one of its students by a fellow student and defending a wrongful death action brought by parents alleging that Virginia Tech failed to prevent the suicide of their son who was living off-campus.

In *Educational Media Co. v. Swecker*, a suit brought by the University of Virginia and Virginia Tech student newspapers challenging the constitutionality of ABC regulations that restrict the advertisement of alcohol in college student publications, the U.S. district court found the regulations to be facially unconstitutional and issued a permanent injunction. On appeal, in April 2010, the Fourth Circuit issued its opinion reversing and remanding the matter for further proceedings. The newspapers' petition for rehearing and rehearing en banc was denied, and the newspapers' petition for certiorari

was denied. The Unit continues to defend the remaining issues on remand to the district court.

In addition, the Unit defended four significant cases involving the State Board of Elections: in *Lux v. Rodrigues* the complaint alleged that a residency requirement for people circulating petitions seeking to add someone to a congressional ballot is unconstitutional; *Libertarian Party of Virginia v. State Board of Elections* challenged the requirement that persons who circulate and witness petitions to add a congressional candidate to a ballot must be from the district where the would-be candidate wants to run; in *The KnowCampaign v. Rodrigues*, a non-profit voting advocacy challenged a statute that limits the Board's ability to distribute voting history lists; and in *Project Vote v. Rodrigues*, plaintiff alleged that the Board's refusal to permit the inspection of voter registration applications violated the National Voter Registration Act of 1993.

Finally, in representing the Birth-Related Neurological Injury Compensation Program, the Unit provides legal advice to the Board and its Executive Director, defends appeals of Board decisions regarding specific claims for benefits to the Workers' Compensation Commission, and represents the Program in eligibility determination cases from the Workers' Compensation Commission through the Virginia Court of Appeals. In 2010, the Section handled 12 new eligibility petitions.

Employment Law Unit

This Unit continued to provide employment law advice to many different state entities, such as the Department of Human Resource Management, the Human Rights Council, the Virginia Indigent Defense Commission, the Department of Labor and Industry, the Department of Minority Business Enterprise, the State Board of Elections, the Department of Corrections, the Department of Transportation, the Department of State Police, and the Supreme Court of Virginia.

In 2010, the Unit advised the Department of Human Resource Management on the possible implications of the Fair Labor Standards Act ("FLSA") on bonuses paid to state employees on December 1, 2010. The Unit also successfully resolved a FLSA audit brought by the United States Department of Labor involving overtime pay issues relating to Claims Deputies, Appeals Examiners and Quality Control Auditors employed by the Virginia Employment Commission.

The Unit handled several significant cases in 2010. For example, *Eke v. Virginia Department of Corrections* validated the Commonwealth's position that employees who challenge the termination of their employment in a grievance hearing provided by the statutory grievance procedure are thereafter precluded from re-litigating claims relating to their termination in state court. In *Bianchi v. Old Dominion University*, the Unit secured dismissal of the defendant university in a reverse sex discrimination case brought under Title VII, and in *Department of Juvenile Justice v. Boykin*, the Unit successfully argued that the definition of "retaliation" under the statutory grievance procedure was narrower than the definition provided for the term under Title VII.

In addition, Unit attorneys provided training and/or advice to other state agencies. Topics included recent case decisions, workplace harassment and retaliation, the rights and protections relating to state employees who are serving or have served in the military, the 2008 amendments to the Americans with Disabilities Act, and the Notice of Proposed Rulemaking by the United States Equal Employment Opportunity Commission. Lectures

were held in Roanoke, Charlottesville, Richmond and Norfolk, and training was provided to personnel of the Department of Behavioral Health and Developmental Services, public defenders at the annual conference of the Virginia Indigent Defense Commission, and at the Commonwealth's Executive Institute.

Workers' Compensation Unit

The Workers' Compensation Unit defends workers' compensation cases filed by employees of State agencies. Because cases are heard throughout the Commonwealth, cases are assigned to attorneys in Richmond, Abingdon, Fishersville and Virginia Beach. The Unit handles claims brought by injured workers and employer's applications from initial hearing before a Deputy Commissioner, through review by the Full Commission, and in appeals to the Virginia Court of Appeals and the Virginia Supreme Court. In 2010, the Unit handled 352 new cases.

In addition, the Unit provides advice and training to the Department of Human Resource Management's Office of Workers' Compensation and its third-party administrator concerning claims, compensability decisions and other legal matters arising from the routine handling of claims. The Unit recovers funds for the Office of Workers' Compensation and works to prevent double recovery by claimants by pursuing subrogation claims in instances where the injured worker receives monies in litigation involving the accident in which he was injured. In 2010, the Unit assisted the Office of Workers' Compensation and its third-party administrator with recoveries exceeding \$1,500,000.

Construction Litigation Section

The Construction Litigation Section is responsible for all litigation concerning construction of roads, bridges, and buildings for the Commonwealth's agencies and institutions. The Section defends, makes claims, or files lawsuits against construction and design professionals or surety companies in the context of construction disputes. Further, the Section provides ongoing advice to the Department of Transportation and other state agencies, colleges and universities during the administration of well over \$2 billion in building, road and bridge contracts. These efforts support effective partnerships between the Commonwealth, general contractors and the road builders, and facilitate timely and efficient completion of construction projects. In 2010, the Section opened 25 new claim and litigation files. In addition, 7 matters seeking nearly \$27.5 million were resolved for a collective total payment of approximately \$2.6 million.

Antitrust and Consumer Litigation Section

The Antitrust and Consumer Litigation Section obtained several significant results in the antitrust and consumer protection areas during 2010. In the antitrust area, the Section, along with the other litigating States, announced a settlement with the seven remaining defendants in a multi-state price-fixing antitrust case filed in 2006 against manufacturers of dynamic random access memory (DRAM) chips for computers. The settlement provides for \$19.67 million to be paid to the settling States in three installments. The States previously settled with two other defendants, making Virginia's share from all three settlements approximately \$725,000.

The Section filed three actions alleging violations of the prohibitions found in the Virginia Consumer Protection Act relating to the acceptance of advance fees by foreclosure rescue companies. The Consent Judgment entered into with one of the companies enjoined the prohibited conduct and required the company to pay \$94,388.73 to 273 consumers across the country in restitution for unearned advance fees collected, and \$15,000 for civil penalties and reimbursement of the Commonwealth's attorney's fees and costs.

In addition, after filing suit against two automobile lenders based on the Consumer Finance Act, the Section entered into settlements with the two companies. The complaints alleged that each company made loans to consumers for personal, family, household or other non-business purposes, charged interest in excess of the limits prescribed by the law, and failed to provide consumers with the minimum 25-day finance charge grace period required for open-end credit loans under Virginia law. The settlements require the companies to make refunds totaling \$18,288 to 162 borrowers, and to forbear collection of \$85,366.97 in deficiency judgment amounts owed by 89 borrowers who defaulted and whose cars were repossessed, and \$97,459.72 in outstanding interest (and in some cases principal) from borrowers who obtained loans from the companies and did not default, or, in the alternative, defaulted and did not have their vehicle repossessed.

The Section also entered into four multi-state consumer protection settlements that provide monetary and other benefits to Virginians. The settlement with LifeLock, Inc., an Arizona-based identity theft protection provider, prohibits the company from misrepresenting its services and requires the company to pay \$11 million for nationwide restitution, which ultimately was used to pay, among others, the claims of 25,965 Virginians who had signed up for the company's services during the period when false claims were made. The Section obtained a Supplemental Consent Judgment with Publishers Clearing House (PCH) that enhances the injunctive terms of a Consent Judgment entered in 2000, which addressed alleged violations of state consumer protection laws related to PCH's marketing of magazine subscriptions and merchandise through its promotional sweepstakes solicitations. In addition, DirecTV, Inc. entered into an Agreed Final Judgment/Consent Judgment and Permanent Injunction that requires clearer and more specific disclosures about pricing and contract terms, a complaint handling procedure and restitution for aggrieved consumers, and also requires the company to pay \$13.25 million to the States. Virginia's share of the settlement payment was \$185,000. Finally, Valero Retail Holdings, Inc. and Valero Marketing and Supply Company agreed to implement voluntarily new policies to reduce the sale of tobacco to minors.

In the consumer education area, the Section announced in November a partnership with the Consumer Federation of America (CFA), the Virginia Department of Agriculture and Consumer Services, the Virginia Credit Union League, and the Virginia Bankers Association on a program aimed at protecting consumers and financial institutions from fake check scams. Participating banks and credit unions are providing, with limited exceptions in their discretion, a brochure created by the CFA about fake check scams and similar frauds to every customer who comes in to deposit checks or money orders of \$1,000 or more or to withdraw \$1,000 or more.

On a regulatory front, after the 2010 General Assembly enacted a new licensing scheme for motor vehicle title lenders, we provided comments to, and participated in a hearing at the State Corporation Commission (SCC) concerning regulations proposed for adoption by the SCC's Bureau of Financial Institutions. The SCC ultimately adopted all ten of our suggestions.

Finally, we served as legal counsel to the Governor's Defective Drywall Taskforce and the Governor's Mortgage Foreclosure Taskforce. The Defective Drywall Taskforce was created in 2010 to ensure a coordinated state response in seeking federal assistance for Virginia homeowners affected by the importation and use of this construction product, and the Mortgage Foreclosure Taskforce was created during the last administration and continues with a focus on regulatory reform, data gathering, and community outreach.

Insurance and Utilities Regulatory Section

The Division's Insurance and Utilities Regulatory Section serves as the Division of Consumer Counsel in matters involving public utilities and insurance companies before the State Corporation Commission (SCC), and to federal agencies such as the Federal Energy Regulatory Commission (FERC) and Federal Communications Commission (FCC). In this capacity, the Section represents the interests of Virginia's citizens as consumers in the regulation of services and products of insurance companies and regulated utilities including electric, natural gas, water, and telecommunications companies. The Section also appears before General Assembly legislative committees to address issues that implicate consumer interests in the regulation of these industries. Cases at the SCC involving the Commonwealth's three largest investor-owned electric utilities dominated the Section's activities in 2010. These included rate cases of Appalachian Power and Dominion Virginia Power and the sale of Allegheny Power's Virginia service territory to two electric cooperatives.

The Section was successful on numerous issues in Appalachian's base rate case decided by the SCC in July 2010. Appalachian had sought an increase of \$154 million in annual revenues. The SCC reduced Appalachian's request by more than \$92 million. The Commission adopted Consumer Counsel's positions to deny a requested performance incentive that would have added to Appalachian's authorized return on equity and to disallow recovery of costs associated with the Mountaineer Carbon Capture and Sequestration Demonstration Project. The SCC also agreed with our contention that Appalachian's capacity deficit position within the AEP-East power pool has had an adverse impact on both Appalachian and its customers, and the SCC directed the company to file further information on this issue. Earlier, we had supported legislative action that suspended the imposition of Appalachian's interim rate increase. The Section joined a stipulation among parties in Appalachian's fuel factor rate case that reduced rates by more than \$100 million, which had the effect of more than offsetting the \$61.5 million base rate increase.

In one Dominion rate case of 2010, the Section joined the SCC Staff and all other parties in the case in negotiating a global settlement that will bring a total of \$726 million in rate credits for Dominion's residential and business customers. Before the rate case hearing, the Section, along with several industrial and commercial customers, obtained an initial commitment from Dominion to provide rate credits of \$397 million, while

preserving the opportunity for SCC Staff and other parties to litigate all issues. This led to an eventual stipulation valued at \$726 million in what is believed to be the largest settlement to date in a utility rate case in SCC history. The stipulation also included the favorable resolution of an appeal of a FERC decision that the Attorney General and SCC were pursuing against Dominion at the Fourth Circuit Court of Appeals.

In another Dominion rate case, the company sought approval of 12 demand-side management programs, which originally included a proposed \$600 million deployment of Advanced Metering Infrastructure, or “smart meters.” Consumer Counsel’s expert witness questioned the costs and benefits of Dominion’s smart meter proposal, and the company withdrew its request for full deployment. Consistent with the Section’s recommendations, the SCC did not approve seven of the proposed programs. The programs disallowed saved consumers \$24 million in first-year costs, which would have accelerated in future years.

The Section worked closely with Frederick County in securing financial concessions from Allegheny Power to protect the interests of customers in the utility’s sale of its Virginia service territory to Rappahannock Electric Cooperative and Shenandoah Valley Electric Cooperative. The Section was concerned that the transaction as originally proposed could result in sharply higher rates for Allegheny’s 102,000 customers and place undue burden on the two cooperatives’ 145,000 existing customers. Allegheny agreed to contribute \$27.5 million to the cooperatives to reduce their power supply costs for former Allegheny customers through June 2015, and an additional \$35 million to reduce the cooperatives’ purchase price of the service territory, which will mitigate rate increases for all customers. The cooperatives also committed to limit future rate increases to the newly acquired customers and to provide for representation for the former Allegheny customers on their respective boards of directors.

The Section’s activities in natural gas matters included a Columbia Gas of Virginia rate case and conservation and decoupling cases for Washington Gas Light Company (WGL). Columbia sought \$13 million in additional annual revenues. Consumer Counsel reached an agreement with the company, SCC Staff, and other parties in which the rate increase was limited to only \$4.9 million, or 62% less than the original request. As for WGL, the Section objected to proposed cost-shifting among groups of residential customers that would result in inappropriate subsidies as part of a conservation and ratemaking efficiency (CARE) plan. Our position was adopted by the SCC. A subsequent application to amend other parts of WGL’s CARE plan was denied after the Section identified legal deficiencies with the proposal.

In a water utility case with complex rate design issues, Alpha Water Corporation and 16 of its affiliated companies sought SCC approval to increase water and sewer rates by \$3.2 million and consolidate rate schedules among the various companies. Consolidating the rate schedules would have caused rate shock for many customers. The SCC approved a revenue increase of \$2.1 million, and, consistent with Consumer Counsel’s positions, it did not approve a move to a single statewide rate for all water utilities.

The Section also continued to monitor closely periodic requests of Anthem to modify merger conditions imposed by the SCC in the 2002 acquisition of Trigon. Anthem sought to allow database associates of an offshore vendor located in India to contact health care providers in order to update provider information in the database

system. Merger conditions imposed limits on services that could be provided from outside Virginia and the United States. Both the Section and the Medical Society of Virginia raised concerns with Anthem's proposal. The SCC denied the request finding that Anthem had not met its burden of proof in showing that the proposal would not degrade the quality of service and communication to Virginia health care providers.

Division of Debt Collection

The mission of the Division of Debt Collection is to provide all appropriate and cost effective debt collection services on behalf of every state agency. The six attorneys and twelve staff members of the Division protect the taxpayers of Virginia by ensuring fiscal accountability for the Commonwealth's receivables. Division attorneys also provide advice on collection and bankruptcy issues to client agencies and to other Divisions within the Office of the Attorney General, and one attorney serves as general counsel to the Unclaimed Property Division of the Department of Treasury.

The Division is self-funded by contingency fees earned from its recoveries on behalf of state agencies. During the 12 months from July 1, 2009, through June 30, 2010, gross recoveries for 40 state agencies totaled in excess of \$10.3 million. During fiscal year 2010, the Division recognized fees of almost \$2.3 million, which equates to nearly \$488,000 in excess of Division expenditures. These excess fees were turned over to the General Fund at the end of the fiscal year.

Sexually Violent Predators Civil Commitment Section

Since the Sexually Violent Predator Act became effective in April of 2003, the Section has filed 412 petitions for civil commitment or conditional release out of the 767 cases referred to it. In 2010, the Section filed 107 petitions and reviewed 43 other cases that did not meet the statutory criteria for commitment. During 2010, the Section made 354 court appearances and traveled nearly 65,000 miles. Currently, there are approximately 255 persons committed to the Virginia Center for Behavioral Rehabilitation, the facility operated by the Department of Behavioral Health and Developmental Services for SVPs.

HEALTH, EDUCATION, AND SOCIAL SERVICES DIVISION

The attorneys in the Division of Health, Education, and Social Services provide advice, counsel, and guidance that sustain the dignity and value of human life. They represent the agencies that provide services to those least able to help themselves, to those facing traumatic mental illness, and to those in the most vulnerable stages of life. The Division provides counsel to the public colleges and universities that daily impact the lives and educations of students. The Division protects the rights of tax-paying Virginians by ensuring the proper use of state and federal funds in a myriad of health and social service programs.

Education Section

The Education Section provides guidance that ensures quality education for students from kindergarten through college. For K-12, this guidance often directly impacts local schools in implementing the Standards of Learning and Standards of Quality, providing access to technology for disadvantaged students, maintaining discipline and safety on

school grounds, complying with federal education programs, and improving school facilities. Virginia's 14 colleges and 23 community colleges are self-contained communities with the full range of legal needs: campus safety and security; admission and educational quality issues; personnel issues; the proper relationship between colleges and the Commonwealth; contracts; procurement; and financing.

The nationwide focus on campus safety as a result of the tragic shootings at Virginia Tech continued in 2010. Section attorneys have worked carefully with campus administrators in providing legal advice and counsel to help identify and deal with troubled students. Legal issues related to campus safety have included risk management, Family Education Rights Privacy Act, mental health reform, and disaster planning.

Health Services Section

The attorneys in the Health Services Section worked closely with the Department of Behavioral Health and Developmental Disabilities to restructure the system of services available to individuals with intellectual disabilities. For instance, the Section gave advice on issues arising from the downsizing of Southeastern Virginia Training Center (SEVTC) in Chesapeake. The Section continued to represent the Commonwealth in *The Arc of Virginia, Inc. v. Kaine*, a lawsuit filed by the Virginia Office for Protection and Advocacy (VOPA) alleging violations of the Americans with Disabilities Act and § 504 of the Rehabilitation Act and seeking to enjoin the construction of a replacement facility for SEVTC. After the Section successfully defended the case in the federal district court, the plaintiff appealed to the Fourth Circuit. The plaintiff voluntarily dismissed its appeal after the Section filed a brief on behalf of the Commonwealth.

The Section also continued to represent the Department of Behavioral Health and Developmental Services in the federal investigation of the Central Virginia Training Center in Lynchburg under the Civil Rights of Institutionalized Persons Act. In 2010, the Justice Department expanded its investigation to review whether the Commonwealth is violating the Americans with Disabilities Act by failing to appropriately discharge training center residents to community settings; but the Justice Department's report was not finalized by the end of the year.

The Section assisted the State Solicitor General in defending *Virginia Office for Protection & Advocacy v. Stewart*, a case involving access to privileged documents maintained by state-operated facilities for persons with mental illness and developmental disabilities. VOPA filed a petition for certiorari following the Fourth Circuit's decision that sovereign immunity precludes one state agency from suing another state agency in federal court. The United States Supreme Court granted certiorari and oral arguments were heard in December 2010.

The Section continued its efforts assisting the Department of Behavioral Health and Developmental Services with mental health law reform. The Section drafted legislation and provided training on 2010 legislative changes, including legislation that permits a court to impose mandatory outpatient treatment following a period of inpatient treatment. Attorneys worked with the State Health Commissioner on issues regarding emergency preparedness and response in the context of pandemic influenza and a manmade disaster. The Section also extensively advised the Health Department on the isolation of patients with tuberculosis.

Social Services Section

This Section provides guidance regarding the technically complex laws, rules, and guidelines governing Medicaid, Family Access to Medical Insurance Security, Temporary Assistance for Needy Families, Child Care Assistance, Food Stamps, Energy Assistance, foster care, and the Commonwealth's social service programs. The Section was successful in defending the appeal of founded child protective services complaints, defended a number of licensure revocation cases, including several involving daycare facilities, provided counsel in issues regarding eligible special needs children, and worked to improve the delivery of foster care. The section handled a number of provider transportation cases filed against DMAS, and was often called upon to determine the interplay between manual provisions, which are guidelines, and state regulations, which have the effect of the law.

In *Department of Social Services v. Mario Velasquez-Flores*, the Court of Appeals of Virginia deferred to the findings of the local department, which had accepted the defendant's confession and determined that he qualified as a caretaker for purposes of imposing civil liability for child abuse. Specifically, the Court held that the circuit court "erroneously usurped the agency's fact-finding authority" in rejecting the agency's credibility determination and that the determination of what constitutes a "caretaker" was "within the specialized competence of the agency" and was a matter for the agency's discretion, not to be disturbed by the circuit court on review.

Child Support Enforcement Section

The Child Support Enforcement Section continued its efficient and vigorous prosecution of child support cases. Section attorneys handled 137,982 child support hearings. The Section procured new child support orders totaling nearly \$1.5 million, enforced existing orders by obtaining lump sum payments in excess of \$14 million, and secured sentences totaling more than 725,230 days in jail.

The Section obtained a favorable decision in the Virginia Court of Appeals in a case in which the trial court had ordered the father to pay the mother \$30 per week in child support for three children pursuant to the parties' 1966 divorce decree. The mother applied for the services of the Division of Child Support Enforcement in 2006. The Division re-opened the case and established arrears in the principal amount of \$17,432.43, plus interest of \$56,196.67. The Virginia Court of Appeals upheld the trial court order ruling that the 20-year statute of limitations on enforcing money judgments applies only to liquidated money judgments. The court reasoned that, because a child support order is ongoing, there is no judgment for a sum certain or liquidated amount of money so that the statute of limitations does not apply. The Virginia Supreme Court granted the father's petition for rehearing on the denial of his petition for appeal, but has not yet decided whether it ultimately will grant the petition for appeal.

The Section managed 42 appellate and trial cases and successfully defended 20 claims or appeals against the Commonwealth exceeding \$16 million, including a United States Supreme Court case, a Virginia Supreme Court case, 5 Virginia Court of Appeals cases, 5 circuit court cases, and 3 federal district court cases in Virginia. In addition, during the 2010 General Assembly session, section attorneys spent 265 hours reviewing 31 bills, 13 of which were of particular importance to the agency. The Section provided counsel on 5 significant bills addressing health care and 2 others addressing distribution

of child support arrears required by the Deficit Reduction Act of 2005 and enhancements to the Division's Intensive Case Monitoring Program for child support.

PUBLIC SAFETY AND ENFORCEMENT DIVISION

The Public Safety and Enforcement Division comprises the following Sections: Computer Crimes, Correctional Litigation, Criminal Litigation, Medicaid Fraud and Elder Abuse, and Special Prosecutions and Organized Crime. The Division handles criminal appeals, prisoner cases, Medicaid fraud cases, health professions hearings, Alcoholic Beverage Control (ABC) enforcement hearings, as well as prosecutions relating to child pornography, gangs, money laundering, fraud, patient abuse, and public corruption. Additionally, the Division provides counsel for all of the state agencies within the Public Safety Secretariat and for the Office of Commonwealth Preparedness. Finally, with the exception of TRIAD, the Division is responsible for the Attorney General's anti-crime initiatives. These programs include the nationally recognized Gang Reduction and Intervention Program, and the work of the statewide facilitator for victims of domestic violence.

Computer Crime Section

In accordance with § 2.2-511, the OAG has concurrent and original jurisdiction to investigate and prosecute crimes falling under Virginia's Computer Crimes Act, crimes that implicate the exploitation of children, and crimes involving identity theft. The Section's attorneys are cross-designated as Special Assistant United States Attorneys and prosecute cases in federal as well as state courts. During 2010, the Computer Crime Section continued to travel extensively throughout the Commonwealth to investigate and prosecute such crimes. Jurisdictions in which the Section handled cases include the counties of Chesterfield, Craig, Halifax, Henrico and Prince George, and the cities of Arlington, Harrisonburg, Lexington, Richmond and Roanoke.

The notable cases the Section prosecuted in 2010 include *United States v. Marlowe*, which resulted in a guilty plea to two counts of transportation of child pornography. An undercover FBI agent detected the defendant after the agent downloaded several child pornography images using a peer-to-peer file-sharing program from the defendant's computer. A subsequent search warrant and forensic examination of the defendant's computer revealed hundreds of images of child pornography, including two emails sent from his AOL account, with each containing dozens of child pornographic images as attachments. He subsequently admitted to having inappropriate sexual contact, including rape and sodomy, with at least six minors from 2001 to 2009, with the most recent incident involving a three-year-old girl. The court sentenced the defendant to 17 years and 6 months imprisonment.

Section prosecutors also handled the guilty plea and sentencing of the defendant on one count of receipt of child pornography in *United States v. Willard* after Willard had been detected trading child pornography on a peer-to-peer network by a FBI agent working in an undercover capacity in San Diego, CA. Agents executed a search warrant at Willard's residence where they seized several computers and computer media on which hundreds of child pornography images and dozens of child pornography videos were saved as part of Willard's peer-to-peer file sharing program. The images portrayed prepubescent children being sexually abused and forced to engage in sadistic and masochistic conduct.

Many of the children were identified by the National Center for Missing and Exploited Children, based in Alexandria, VA, as past victims identified in previous law enforcement investigations. The court sentenced the defendant to 8 years imprisonment and an additional 5 years of supervised release.

In *Commonwealth v. Ednie*, a two-day jury trial in circuit court on 18 counts of possession of child pornography, resulted in a guilty verdict guilty on all 18 counts and a sentence of 9 years imprisonment, which the court affirmed. Prosecution followed the detection of the defendant by Undercover Immigration and Customs Enforcement Agents when the defendant attempted to purchase child pornography from a website. A subsequent forensic examination of his computer equipment revealed hundreds of child pornography images saved in the computer's temporary Internet cache, which the defendant had attempted to delete during the initial knock-and-talk conducted by investigators.

Section prosecutors handled the guilty plea and sentencing of the defendant in circuit court on two counts of possession of child pornography in *Commonwealth v. Bailey*. The case arose after an undercover investigator from New Hampshire posing as a 14 year-old boy met Bailey in an online chat room. Virginia State Police agents ultimately assumed the persona of the New Hampshire investigator and engaged in chats with the defendant where he made sexual solicitations and sent pictures of nude, young male teens. A subsequent forensic examination of his computer revealed dozens of child pornography images saved on the defendant's computer. The defendant was sentenced to 5 years and 10 months imprisonment with an additional 6 years and 2 months suspended.

The Section also actively participates in taskforces involving federal, state and local law enforcement. The Virginia Cyber Crime Strike Force establishes a centralized location for the reporting of Internet-related crime. The Strike Force also provides a part-time investigator and three prosecutors to crimes committed via computer systems in both state and federal courts, including cases involving computer intrusion/hacking, Internet crimes against children, Internet fraud, computer and Internet-related extortion, cyber-stalking, phishing, and identity theft. The Peninsula Innocent Images Task Force, based at the Newport News U.S. Attorney's Office, investigates and prosecutes Internet crimes against children. The Computer Crime Section has provided one part-time investigator and its three prosecutors, on an "as needed" basis, to pursue the Task Force's cases in federal and state courts.

In addition to investigating and prosecuting computer crimes, the Section serves as a clearinghouse for information concerning criminal and civil misuses of computers and the Internet. In 2010, the Section's investigators handled over 1,000 investigatory leads funneled through the Internet Crime Complaint Center, the primary national clearinghouse for computer crime complaints. The Section also reviewed over 200 notifications from companies experiencing database breaches for compliance with the database breach notification law contained in Virginia Code § 18.2-186.6. Given these responsibilities, the members of the Section are often called upon to give presentations or to make appearances on television and radio in an effort to inform the public about issues such as the increasing scourge of identity theft and the ever mounting use of the computers and the Internet by sexual predators to make contact with children.

During 2010, as in past years, members of the Computer Crime Section traveled frequently throughout Virginia to speak to students and parents and deliver the office's

“Safety Net” presentation. “Safety Net” is an interactive presentation that addresses issues of “cyber-bullying” and “sexting,” and utilizes a real-life story to demonstrate how easy it is for a predator using very little personal information to track down a child victim over the Internet. This past year, members of the Section delivered the presentation over 50 times to schools in Alexandria, Bath, Buckingham, Chatham, Fairfax, Henrico, Highland, Martinsville, Richmond, Roanoke, Suffolk, Virginia Beach, and many other locations throughout the Commonwealth.

The Section’s team of prosecutors and investigators also continues to educate and train prosecutors and law enforcement statewide. Throughout 2010, the Section’s prosecutors and investigators trained law enforcement and school resource officers at police training academies in Abingdon, Roanoke, Shenandoah, Manassas, and Hampton Roads. The training focused on obtaining search warrants for digital evidence and the use of procedural tools in the investigation of computer crimes, as well as an overview of the pertinent law related to computer and digital-based investigations. The Section’s prosecutors also presented an overview of computer crime law to prosecutors attending the Virginia Association of Commonwealth’s Attorneys’ training program in Williamsburg.

Correctional Litigation Section

The Correctional Litigation Section represents the Departments of Corrections, Juvenile Justice, and Correctional Education, as well as the Parole Board. Further, the Section represents the Secretary of Public Safety and the Governor on extradition matters, Commonwealth’s Attorneys on detainer matters, and Correctional Enterprises. During 2010, the Section handled 101 § 1983 cases, 12 employee grievances, 165 habeas corpus cases, 301 mandamus petitions, 42 inmate tort claims, 12 warrants in debts, and 254 advice matters. The Section also handled several significant matters in the federal district courts, the Fourth Circuit Court of Appeals and the circuit courts of the Commonwealth, including 5 trials, 38 hearings, 19 videoconferences and 5 oral arguments.

Several U.S. district court cases warrant highlighting. In *Minnis v. Johnson*, the Department of Corrections entered into a comprehensive settlement agreement to protect the civil rights of deaf prisoners while maintaining maximum flexibility to ensure safe and efficient prison operations. The agency entered into another agreement in *Prison Legal News, Inc. v. Johnson* with the publisher of a prisoner-operated legal newsletter in order to correct some deficiencies in how the newsletter had been handled by staff. Settlement was also reached in two Religious Land Use and Institutionalized Persons Act cases. *Ray v. Brown* has caused the Department of Corrections to modify its procedures regarding publication review, and in *Mabe v. Commonwealth*, which challenged a rule that prohibits the possession of spoken word CDs for security reasons, an agreement was reached that allows a certain number of religious CDs to be possessed while maintaining a mechanism for their review for security purposes.

In *Burnette v. Virginia Parole Board*, the court granted our motion to dismiss a class action suit in which 11 inmates convicted of violent crimes allege that their ongoing Virginia Parole Board denials of release on discretionary parole violate due process and effectively constitute an abolition of parole in violation of the *ex post facto* clause. Plaintiffs’ motion to vacate the dismissal to allow them to amend their way back into

court is still pending. The Section also successfully defended claims of excessive force in *Wilson v. Collins*, in which counsel for the plaintiff agreed to dismiss the medical defendants and the jury dismissed the case against all three defendants after a 45-minute deliberation following the two-day jury.

In another case, *Randolph v. Kelly*, an asthmatic inmate complained his medical condition was aggravated because he was housed with a heavy smoker; the court found that the inmate failed to show significant physical injury resulting from the exposure. In *Grantham v. Watson*, Grantham alleged that personnel at Wallens Ridge State Prison failed to protect him from two sexual assaults by his cellmate. Grantham named 13 individuals as defendants, including the Warden, the prison Chief of Security, and numerous correctional officers, and Grantham sought \$2 million in damages. After extensive discovery, we filed a motion for summary judgment on the merits. Prior to the hearing on the motion, Grantham's counsel filed a stipulation of dismissal.

Finally, in *Green & Brumfield v. Adams*, two inmates alleged that a correctional officer at Fluvanna Correctional Center for Women allowed another inmate to enter their cell and assault them with two combination locks concealed in a sock. The plaintiffs suffered serious injuries from the attack, and the assailant was convicted of criminal charges relating to the assault. The plaintiffs sought \$10 million in damages. The court granted our motion for summary judgment based on exhaustion of administrative remedies. The plaintiffs have appealed to the Fourth Circuit Court of Appeals.

Criminal Litigation Section

The Criminal Litigation Section handles an array of post-conviction litigation filed by state prisoners challenging their convictions, including criminal appeals, state and federal habeas corpus proceedings, petitions for writs of actual innocence, and other extraordinary writs. The Section's Capital Unit defends against appellate and collateral challenges to all cases in which a death sentence was imposed. In addition, Section attorneys review wiretap applications and provide informal advice and assistance to prosecutors statewide. Finally, the Section represents the Capitol Police, state magistrates, and the Commonwealth's Attorneys' Services Council. In 2010, the Section defended against 940 petitions for writs of habeas corpus and represented the Commonwealth in 378 appeals in state and federal courts. The Section received 36 petitions for writs of actual innocence, an ever-increasing area of responsibility.

Among the Section's many significant cases during the past year were appeals decided by the Virginia Supreme Court. For example, in *Carroll v. Commonwealth* the Court upheld the revocation of a rape convict's probation for refusing to admit his guilt, a requirement to complete successfully the mandatory sex offender treatment program. The Court ruled that the defendant, who pled guilty while refusing to admit his actual guilt, as allowed by *North Carolina v. Alford*, did not retain a "right" thereafter to maintain his innocence in every situation. In *Noakes v. Commonwealth*, the Supreme Court affirmed the defendant's conviction for involuntary manslaughter where her criminally negligent actions resulted in an infant's death by suffocation. The Supreme Court in *Carosi v. Commonwealth* affirmed Carosi's convictions for child endangerment based on the defendant's rearing her three young children in a home where illegal drugs were readily accessible to them. In *Jones v. Commonwealth*, the Court held that a driver's refusal to perform field sobriety tests might be considered in determining

probable cause to arrest for driving under the influence when such refusal is accompanied by evidence of alcohol consumption.

The Section also litigated numerous cases in the Virginia Court of Appeals. For example, in *Whitfield v. Commonwealth* the Court of Appeals affirmed the defendant's convictions for involuntary manslaughter and felony child neglect, holding the evidence was sufficient to find criminal negligence where the defendant, a daycare van driver, left a baby he was transporting in a hot van all day, resulting in the baby's death. The Court in *Hodnett v. Commonwealth* held that the defendant, while a prisoner in jail, committed two separate assaults against a correctional officer when, in quick succession, he twice dipped a cup into his cell toilet and threw the contents at the officer. The Court also held in *Lamm v. Commonwealth* that the defendant, who had been convicted of aggravated malicious wounding, was not entitled to a new trial based on after-discovered evidence that the victim no longer had permanent and significant physical impairment because her sense of smell and taste had returned. In *Turner v. Commonwealth*, after a panel had granted the petitioner's actual innocence petition attacking his convictions for the first degree murder and abduction with intent to defile of a college student, the en banc Court of Appeals held the petitioner had not met his burden of proof and dismissed his petition. In *Collins v. Commonwealth* the Court of Appeals upheld the defendant's abduction and use of a firearm convictions, holding that his status as an out-of-state bail bondsman in search of a fugitive did not give him a legal justification to enter Virginia and use force to seize a "bail jumper." Finally, in *Grafmuller v. Commonwealth* the Court of Appeals ruled that the defendant was subject to a mandatory, minimum punishment of five years in prison, even though the person he had solicited was in fact a police officer and not a 13-year-old girl.

The Section's Capital Unit defended on appeal and collateral attack the convictions of persons sentenced to death under Virginia law. Three death-row inmates were executed in 2010. In *Powell v. Kelly*, the Fourth Circuit affirmed the sentence of death in a split decision, the United States Supreme Court denied the certiorari petition, and Powell was executed. In *Walker v. Kelly*, we successfully defended against three separate challenges to Walker's death sentence. The case involved numerous remands from the Supreme Court and Fourth Circuit and three evidentiary hearings. The Supreme Court denied stays and petitions for certiorari review and Walker was executed. In *Lewis v. Wheeler*, after an extensive evidentiary hearing in the state court, the Virginia Supreme Court and the Fourth Circuit denied relief. The United States Supreme Court denied a stay and a petition for certiorari review, and the first female death row inmate was executed in Virginia in 70 years.

Health Care Fraud and Elder Abuse Section

The Virginia Attorney General's Offices' Health Care Fraud and Elder Abuse Section is composed of investigators, auditors, analysts, computer specialists, attorneys and support staff who are charged with investigating and prosecuting allegations of Medicaid fraud and elder abuse and neglect in health care facilities. The Section has been seeing an increase in referrals as it continues to work with local jurisdictions and agencies throughout the Commonwealth. Due to the increase in referrals of fraud against the Virginia Medicaid program, the Virginia Attorney General's Office requested permission from the United States Department of Health and Human Services' (HHS)

Office of Inspector General to increase staff by 25 positions. HHS approved the request and the Section expanded by included five attorneys, eleven investigators, two nurse investigators, two auditors, one analyst, one computer forensic, an IT specialist, one computer programmer and two paralegals. These additional positions doubled the size of the Elder Abuse Squad, resulting in a total of 83 positions in the Section that investigates allegations of elder abuse and neglect.

Medicaid Fraud Control Unit

The Medicaid Fraud Control Unit (MFCU) had a very successful year. At the end of 2010, MFCU had 50 active criminal investigations. The Civil Investigations Squad opened 72 new civil cases, and 9 criminal cases were awaiting trial or sentencing in federal court. The Unit ended the fiscal year with 17 convictions, and the recoveries from criminal and civil investigations totaled more than \$20 million. MFCU delivered restitution checks in excess of \$8.6 million to the Department of Medical Assistance Services to be deposited into the Commonwealth's General Fund Health Care Account.

MFCU handled several significant cases in 2010. For example, in *Commonwealth v. Wright*, MFCU investigators uncovered multiple incidents of alleged sexual misconduct involving Wright, who had been employed as a Certified Nursing Assistant from 1999 to 2007, and elderly patients at a nursing home in Bristol, Virginia. MFCU investigators substantiated the initial allegations, identified eyewitnesses to Wright's conduct, and obtained an admission of misconduct from Wright. MFCU then prosecuted the case. In January 2010, Wright entered an *Alford* plea to four counts of aggravated sexual battery and in May he was sentenced to 60 years' active incarceration. In addition, Wright was ordered to pay a \$10,000 fine for each of the four counts, will be placed on probation upon release, and will be required to register as a sex offender.

In *United States v. McCreary* the owner and operator of Camp Hope Youth Services, a Medicaid contracted provider of Intensive In-home Therapy Services for children and adolescents, submitted false and fraudulent claims for reimbursement to the Virginia Medicaid program. Intensive In-home Therapy Services are designed to assist youth and adolescents who are at risk of being removed from their homes, or are being returned to their homes after removal, because of significant mental health, behavioral or emotional issues. Medicaid requires that Intensive In-home Therapy providers employ qualified mental health workers to provide a medically necessary service to at-risk children and adolescents. McCreary falsely claimed she had provided mental health services to such children and billed Medicaid for services that were not reimbursable because they did not address a child's specific mental health issues, were not provided by qualified mental health workers, and were not provided to children who were in actual need of the offered service. McCreary also billed Medicaid for services that were never provided. In September 2010, McCreary was sentenced to 55 months in prison and ordered to pay \$601,580 in restitution to the Medicaid program. The FBI and the MFCU investigated the case while MFCU and the United States Attorney's Office prosecuted the case.

Another major case is *United States v. Fleming-McClatchey*, in which the defendant operated Professional Healthcare Group and fraudulently billed Medicaid a total of \$946,668.74, of which Medicaid paid \$774,763.44. In 2010, Fleming-McClatchey pled guilty to a one-count criminal complaint charging her with committing health care fraud

for submitting claims for reimbursement for services that were never provided. She was ordered to pay \$774,763.44 in restitution to the Medicaid program and sentenced to 60 months in prison. This was Fleming-McClatchey's second conviction; in 2008, she pled guilty to a one-count indictment charging her with health care fraud and was sentenced to 40 months in prison. The investigation established that Fleming-McClatchey purposely overbilled Medicaid via the home health company in order to make court-ordered restitution payments that had been imposed as part of her sentence in the medical supply fraud case. The case was investigated by MFCU and the FBI and was prosecuted by MFCU and the United States Attorney's Office.

The Section also handled significant civil cases. One of those is the *SmithKline Beecham Corp. (d/b/a GlaxoSmithKline (GSK))* settlement. The Unit, along with the federal government and the other states, settled allegations that GSK violated the federal False Claims Act and analogous state *qui tam* statutes by submitting or causing to be submitted false claims for several drug products it manufactured at its plant in Cidra, Puerto Rico. The federal investigation established a pattern of misconduct that included chronic deficiencies in the quality assurance function at the plant and ongoing violations of laws and regulations, including the Federal Food, Drug and Cosmetics Act and Title 21 of the *Code of Federal Regulations*. GSK's failure to comply with the applicable statutes and regulations rendered the drugs produced at the plant not "covered" drugs for purposes of federal reimbursement. As such, GSK presented or caused to be presented false or fraudulent claims for payment or approval for such drugs to Medicaid and other government health programs for the purpose of defrauding the government. The settlement had civil and criminal components and returned approximately \$750 million to state and federally funded healthcare programs, including Medicaid. As part of the global resolution of the case, GSK subsidiary SB Pharmco Puerto Rico, Inc. pled guilty in federal district court to a felony charge of misbranding based on the failure to maintain FDA-mandated conditions for manufacturing at the plant and GSK paid \$150 million in criminal fines and forfeitures. The settlement released GSK from civil liability based on misconduct at the plant, such as releasing packaged drug products that were sub-potent or super-potent, that lacked the active ingredient, and/or that were contaminated with microorganisms. The civil settlement totaled \$600 million, of which \$348 million is designated as Medicaid Program Recovery and the remaining \$252 million was designated for other federal programs. Virginia's federal and state share of the settlement was \$4,836,643.84, the state share of which totaled \$2,346,469.12.

Another major settlement in which MFCU was involved was the *Novartis Settlement*. The Unit, along with the federal government and the other states, settled allegations that Novartis violated the federal False Claims Act and analogous state *qui tam* statutes by engaging in off-label marketing and paying kickbacks to doctors. The investigation substantiated allegations of off-label marketing and kickbacks associated with Trileptal (oxcarbazepine), a medication intended to control certain types of seizures. The investigation also found support for the kickback allegations for Diovan, Zelnorm, Sandostatin, Tekturna, and Exforge. The settlement resolved four *qui tam* actions and the total criminal and civil settlement amount is \$422.5 million. As to the criminal component, Novartis pled guilty to a misdemeanor charge of misbranding and paid \$185 million in combined fines and forfeitures. Novartis also agreed to pay \$237.5 million, plus interest, to settle the civil complaints. The total civil settlement included damages

for Medicaid and other federal government programs. Virginia's federal and state share of the settlement was \$2,667,934.59, of which the state share equaled \$1,288,646.19.

Special Prosecutions / Organized Crime Section

The Special Prosecutions/Organized Crime Section (SPOCS) is the primary prosecutorial section of the Office of the Attorney General. In addition to prosecuting various crimes throughout the Commonwealth, either pursuant to the Office's jurisdiction under the Virginia Code or by request of local Commonwealth's Attorneys, the Section also represents criminal justice and public safety agencies and implements public safety initiatives set forth by the Attorney General. In 2010, the Section continued to help keep the citizens of the Commonwealth safe through multiple initiatives, including engaging in prevention, intervention, and suppression of criminal street gang activity; the prosecution and prevention of identity theft offenses; administrative prosecutions against medical professionals who have violated Virginia's Health Professions regulations; enforcement of Virginia's fair housing laws; and targeting and prosecuting violators of the Virginia RICO statutes.

Criminal Prosecutions and Enforcement Unit

The Criminal Prosecutions and Enforcement Unit (CPEU) is headed by a Director who reports directly to the Chief of the Special Prosecutions and Organized Crime Section in the Public Safety and Enforcement Division. CPEU is comprised of five Assistant Attorneys General who have also been appointed Special Assistant United States Attorneys, and one gang awareness coordinator. Of the five Assistant Attorneys General, three are federally funded grant positions, which are exclusively assigned to prosecute federal Project Safe Neighborhood cases. They work out of various regional United States Attorney's Offices in the Eastern District of Virginia – one in Alexandria, one in Richmond, and one in Norfolk. An Assistant Attorney General serves as special counsel to the Shenandoah Valley Multijurisdictional Grand Jury investigating gang-related activity in that region. He also has been appointed to serve as the special counsel to a newly formed multijurisdictional grand jury in the Tidewater area.

Assisting Virginia's Commonwealth's Attorneys is a staple of the Section's agenda. In 2010, the Section assisted Commonwealth's Attorneys in numerous prosecutions from all over Virginia, resulting in significant periods of incarceration. The Office's commitment to the Richmond Community Violence Reduction Partnership afforded the opportunity to prosecute several robberies assigned to a multi-agency task force. Other prosecutions ranged from theft and embezzlement of state property to gang participation to trafficking in untaxed cigarettes. For example, a former claims manager of the Virginia Birth-Related Neurological Injury Compensation Fund (BIF) was indicted and pled guilty to embezzling more than \$800,000 from the BIF. The scheme included submitting false invoices to BIF for payment to one of two companies the employee created, which were listed as the vendor or contractor on numerous false or inflated invoices. In some instances, the invoices were for services never rendered and, in others, they were inflated above the total cost for actual services provided by other vendors. The total amount of fraudulent claims alleged in the indictment was \$819,111.48. The defendant was sentenced to ten years imprisonment and ordered to pay full restitution.

CPEU also serves as agency counsel to the Department of State Police (State Police), the Department of Criminal Justice Services (DCJS), and the Department of Forensic Science (DFS). This legal support includes, but is not limited to, the review of legislation proposed by the agency, review of proposed regulations and amendments to regulations, representation before federal and state courts, contractual advice, personnel issues, and legal advice on a broad range of issues. The Unit represents DCJS in administrative hearings involving individuals licensed by the agency such as bail bondsmen, bail enforcement agents, and private security guards and assists State Police with issues such as motions to vacate improperly granted expungements, motions to quash subpoenas duces tecum, and petitions by registered sex offenders to be relieved of their registration requirements.

In addition, members of CPEU represent the Department of Alcoholic Beverage Control's (ABC) Bureau of Law Enforcement Operations at administrative hearings involving the revocation or suspension of ABC licenses, and routinely consult with Enforcement agents about their investigations. The bulk of the administrative hearings handled by CPEU involved licensees with establishments that constituted public safety concerns. For example, an attorney from the section handled the administrative hearing involving Club Velvet, a Richmond strip club. The establishment's ABC licenses were revoked after the evidence showed that the establishment permitted underage consumption of alcohol, permitted after hours consumption of alcohol, permitted alcohol to leave the premises, sold alcohol to intoxicated individuals, had several employees convicted of being nude in the establishment, and that the establishment had become a place where illegal drugs were regularly used or distributed. Unit attorneys also have been asked to represent other state agencies such as the Board of Accountancy and the Department of Charitable Gaming in what can be referred to as "administrative prosecutions."

This Section is significantly involved in the Office's anti-gang initiative. The Section drafts legislation, trains law enforcement and prosecutors on the use of Virginia's gang statutes, and raises public awareness of the signs of gang membership and activity. In 2010, in partnership with Commonwealths' Attorneys Services Counsel, SPOCS designed and participated in training for gang investigators and prosecutors on how to successfully investigate and prosecute a gang case. The training included intelligence gathering and retention, cultivation and utilization of confidential informants, preparation and execution of a gang paraphernalia search warrant, finding and utilizing electronic intelligence and evidence, how to prepare the case for prosecution, and how to successfully prosecute a gang case and counter defense tactics.

CPEU also plays a significant participatory and supervisory role of a multijurisdictional grand jury formed to investigate gang activity in the Shenandoah Valley. Serving as special counsel to the grand jury, one of CPEU's attorneys is assigned to prosecute gang members in state and federal courts in the region and is available as a resource for any jurisdiction seeking assistance in prosecuting violations of the gang statutes. In 2010, this attorney was recognized for his efforts by the Virginia Gang Investigator's Association as the Gang Prosecutor of the Year.

Finally, in 2010, with funds awarded to this Office in a 2009 grant, CPEU conducted five training sessions on counterfeit goods throughout the Commonwealth to

law enforcement and prosecutors. Utilizing contacts made with law enforcement and counterfeit goods experts, the Office provided instructors for the training programs.

Health Professions Unit

The Health Professions Unit (HPU) carries out two primary functions for the Special Prosecutions & Organized Crime Section (SPOCS). First, HPU administratively prosecutes cases involving violations of health care-related licensing laws and regulations before the various health care regulatory boards under the Department of Health Professions, including the Boards of Medicine, Nursing, Pharmacy, and Dentistry. Second, HPU reviews investigative files compiled by the Virginia Fair Housing Office and prepares consultation opinions to the Virginia Real Estate and Fair Housing Boards. When either Board determines that housing discrimination has occurred, HPU prosecutes the civil lawsuits and appeals.

The Health Professions Unit provides legal representation (prosecutorial functions) to the Boards within the Department of Health Professions (DHP): Medicine, Nursing, Pharmacy, Veterinary Medicine, Optometry, Dentistry, Physical Therapy, Psychology, Social Work, Counseling, Audiology & Speech-Language Pathology, Funeral Directors & Embalmers, and Long-Term Care Administrators. In addition to prosecuting administrative actions against the licensees, HPU provides training to investigators, Board staff and Board members.

In a case followed by the press, a Consent Order was entered in June 2010 by the Board of Funeral Homes and Embalmers and National Funeral Homes. National Funeral Homes was alleged to have violated several regulations and code sections, including those related to the care and custody of human bodies, the conduct of funeral services by an unlicensed staff person, providing information on certain forms, and providing records related to credit card transactions and preneed funeral contracts. Although National neither admitted nor denied the findings of fact or conclusions of law set forth in the consent order, the Order sets forth significant sanctions. National Funeral Home's license was suspended for two years, stayed upon certain terms and conditions, including payment of a \$50,000 monetary penalty, up to six unannounced inspections per year during a two-year probationary period and required production of documentation for preneed funeral contracts within 30 days.

The Fair Housing staff prosecutes, in the appropriate local circuit court, alleged violations of the Virginia Fair Housing Law. Such prosecutions are based on the "reasonable cause" findings and resulting Charges of Discrimination issued by the Virginia Real Estate Board and Fair Housing Board. In addition, the Unit serves as counsel to the Real Estate Board for fair housing allegations brought against real estate licensees and/or their employees or agents and to the Fair Housing Board for allegations against non-licensees. In this role, HPU reviews investigative files and provides the Boards with written consultation opinions that analyze the evidence and determine whether the evidence legally supports a finding that there is reasonable cause to believe that an unlawful discriminatory housing practice has occurred.

Financial Crime Intelligence Center

The mission of the Financial Crime Intelligence Center (FCIC) is to identify, target, and disrupt the financial aspects of crime in the Commonwealth. FCIC enables Commonwealth's Attorneys and other law-enforcement officials to better address and

attack the financial aspects of crime in their area by identifying targets for investigations; providing “on-site” financial investigative support; sharing timely intelligence on money laundering; serving as a platform for local and regional outreach programs; providing financial investigative training; providing prosecuting attorneys to assist the Commonwealth’s Attorney in their locality; and assisting in asset identification and forfeiture actions.

In 2010, FCIC’s played a significant role in the prosecution of Michael Loiseau. In March, Loiseau pled guilty to H-1 Kingpin drug distribution and RICO charges. He was sentenced to an active term of 20 years in prison life. His prosecution resulted from a FCIC-directed multi-agency state, local and federal investigation focusing on a drug trafficking organization run by the defendant, who was responsible for the importation and sale of over 200 kilograms of cocaine in the Commonwealth during a two-year period. FCIC’s efforts included assisting Spotsylvania Sheriff’s Detectives in the arrest and the seizure of over \$195,000 in drug proceeds and two vehicles. Further investigation led to the identification of over 15 associates, wholesale and street-level dealers and support personnel responsible for the transportation of cash and the return of multi-kilogram quantities of cocaine back to Central Virginia.

Gang Reduction and Intervention Program

The Gang Reduction and Intervention Program (GRIP) began with a federal grant from the Office of Juvenile Justice and Delinquency Prevention in 2003. This Office, the Richmond Police Department and the Richmond Commonwealth’s Attorney’s Office, among others, partnered with local service agencies and organizations to provide programs and services to gang members wanting to leave their gangs, as well as at-risk youth and their families. The goal of GRIP is to reduce the number of gang-involved youth by providing them with services and healthy alternatives to gang life. The model includes a broad spectrum of programs designed to deal with the full range of personal, family, and community factors that contribute to juvenile delinquency and gang activity. GRIP employs a five-pronged approach: primary prevention, secondary prevention, gang intervention, gang suppression, and reentry services/programs for those being released from jail or prison. The programs are provided in a range of settings, including hospitals, schools, in homes, and at the GRIP-sponsored “One Stop,” a local resource center located in the Gilpin Court area of Richmond, set to open in early 2011.

In May 2010, the Cal Ripken, Sr. Foundation (Foundation) partnered with our Office and the Richmond Flying Squirrels baseball team to host “Badges for Baseball” Day. 250 kids and coaches from Virginia’s 2010 *Badges for Baseball* program sites joining Ripken Foundation representatives and OAG staff on the field, where Foundation representatives presented a check for \$65,000 to representatives from the Stafford County Sheriff’s Office, Boys & Girls Clubs of Metro Richmond, Boys & Girls Clubs of the Virginia Peninsula, and the Boys & Girls Clubs of Lynchburg. The *Badges for Baseball* program pairs law enforcement officer as coaches and mentors with kids in communities throughout Virginia and across the country. The program provides opportunities for kids to play in safe spaces and learn life lessons such as teamwork, respect, and communication that apply to life both on and off the field. The Attorney General threw out the ceremonial first pitch.

Gang Awareness Coordinator

Pursuant to a federal grant, the Section acquired in 2008 a Gang Awareness Coordinator, who educates citizens and law enforcement throughout the Commonwealth on the importance of gang awareness. The Coordinator conducts training sessions provide community members, parents, prosecutors and other agency officials with up-to-date information regarding gang violence, anti-gang initiatives and effective techniques for intervention and prevention. During 2010, over 1500 individuals received such training through 36 gang awareness presentations.

GEAP

Funded by the Grant to Encourage Arrest Policies and Enforcement of Protection Orders (GEAP), an OAG coordinator is responsible for developing, implementing, and facilitating training for Commonwealth's Attorneys and law enforcement officers on domestic and sexual violence issues. The coordinator is also responsible for providing technical assistance on domestic violence related issues to prosecutors in fourteen designated localities: the Counties of Lee, Scott, Wise, Russell, Dickenson, Washington, Fairfax, Henry, and Albemarle, and the Cities of Charlottesville, Roanoke, Martinsville, and Norfolk; and the University of Virginia. In May 2010, members of the Special Prosecutions/Organized Crime Section accomplished the final remaining objective for the OAG under the current GEAP grant by providing two-day domestic violence training for approximately 55 prosecutors and law enforcement officers at the Southwest Virginia Higher Education Center in Abingdon. A preliminary review of evaluations indicates that the training was well received.

Along with providing domestic violence training, the Office also recognizes localities that display innovation in their practices to respond to domestic violence through the Attorney General's Community Recognition Program for Promising Practices in Domestic Violence Response. In October 2010, the Program recognized Washington County for its leadership in addressing domestic violence. The county received monetary awards of \$1,000 from the Verizon Wireless HopeLine Program, which partnered with the OAG and the Virginia Sexual and Domestic Violence Action Alliance on the Program.

Tobacco Enforcement Unit

The Tobacco Enforcement Unit administers and enforces the Tobacco Master Settlement Agreement (MSA), a 1998 agreement between the states and leading cigarette manufacturers. In that effort, the Unit works with the Tobacco Project of the National Association of Attorneys General as well as other MSA states. During 2010, the Commonwealth received more than \$121 million in payments from the participating manufacturers. MSA settlement funds are used to fund medical treatment for low-income Virginians to stimulate economic development in former tobacco growing areas, and to establish programs to deter youth smoking and for obesity prevention.

The Unit also maintains the Virginia Tobacco Directory, which lists tobacco product manufacturers that have been certified as compliant with Virginia law, and collects information on cigarette stamping activity throughout the Commonwealth. The Unit enforces the MSA's implementing legislation through review, analysis and investigation of manufacturer applications to sell cigarettes in the Commonwealth, investigation of alleged violations of law; representation of the Commonwealth in actions under the Virginia Tobacco Escrow Statute; audits of Tax Stamping Agents; retail

inspections; seizures of contraband products; and participation on law enforcement task forces with other federal, state, and local agencies. Specifically, in 2010, the Unit investigated 54 companies, certified 36 cigarette manufacturers as compliant with Virginia law, allowed 11 manufacturers to be voluntarily removed from the directory, denied 3 applications, and de-listed 2 companies. Representatives from the Unit also indicted 6 individuals for trafficking in contraband cigarettes in the Tidewater area. In addition, the Unit continued to represent the Commonwealth in a multi-million dollar MSA payment dispute.

TECHNOLOGY, REAL ESTATE, ENVIRONMENT, FINANCIAL LAW & TRANSPORTATION DIVISION

The Technology, Real Estate, Environment, Financial Law and Transportation Division provides comprehensive legal services to executive agencies, state boards and commissions for much of the Commonwealth's government. Composed of five Sections, the Division provides legal advice across a wide range of substantive subject areas as well as guidance on matters of employment, contracts, purchasing and the regulatory process. The Division's attorneys regularly assist state agencies with complex and sophisticated transactions and also represent those agencies in court, often in close association with other attorneys in the Office.

Technology and Procurement Law Section

The Technology and Procurement Law Section provides the legal support and representation that is needed by the Commonwealth's technology and central procurement agencies and boards to implement their technology agendas, perform their procurement and contracting functions, and address legal claims and compliance issues in all areas. During 2010, this included advice to help the Virginia Information Technologies Agency (VITA) and the Secretary of Technology significantly amend the Commonwealth's Comprehensive Infrastructure Agreement with Northrop Grumman Systems Corporation, as well as guidance to help VITA protect the Commonwealth's interests affected by breach and underperformance of that Agreement. The Section also assisted VITA and the Joint Legislative Audit and Review Commission in obtaining an outside audit relating to a major information technology outage which disrupted many agencies' operations in late August of 2010.

This Section also provided legal support to the Secretary of Administration that addressed supplier diversity challenges and the development of an appropriate policy regarding the protection and release of patents and copyrights owned by the Commonwealth. The Section helped the Innovation and Entrepreneurship Investment Authority resolve litigation pertaining to development and dedication of its property in Northern Virginia. This section also assisted various Commonwealth agencies, institutions, and boards with contract performance problems, technology acquisitions, trademark applications, licensing of Commonwealth data and software to other parties, intellectual property claims and agreements, Internet issues, electronic contracting, settlement of claims, structuring of procurements, and resolution of procurement protests. Additionally, the Section provided training sessions on contractual matters, including at the annual Public Procurement Forum sponsored by the Department of General Services.

Real Estate and Land Use Section

The Real Estate and Land Use Section (RELUS) handles several specialized areas of legal practice. The section litigates, among other matters, boundary line disputes, landlord/tenant issues, title disputes and federal condemnation actions, and it oversees real estate transactions. Real estate questions and transactions affect every state agency to some degree, but the law of real estate is outside the realm of expertise needed by general agency counsel. This Section handles the majority of these issues directly, or provides support and assistance to agency counsel who wish to retain their role as the primary agency contact for a particular matter. The Section does not handle VDOT right-of-way acquisitions.

Significant transactional real estate matters handled by RELUS include sales, purchases, leases and easements on state lands. The Section provides daily advice on real estate issues to the Department of General Services (DGS) and manages the sale and exchange of state surplus property. The Section also handles all leasing and other real property matters for the Department of Military Affairs, the Department of Veterans' Services and the Alcoholic Beverage Control Board. In addition, the Section provides significant real estate support to the various institutions of higher education and provides guidance to state agencies seeking to lease state property for the placement of communications towers. The Section represents the Department of Conservation and Recreation on its real estate matters, including conservation easements, and advises the Virginia Outdoors Foundation on its open-space easements, as well as general legal matters. RELUS also serves as agency counsel for the Department of Historic Resources, providing advice for its historic preservation easement programs and the renovation and restoration incentive programs it administers.

This Section also advises the Division of Engineering and Buildings of the DGS regarding policies, procedures and other issues that arise in that Division's role as statewide construction manager and building official. In addition, the Section staffs the Design Build/Construction Management Review Board, created to authorize local governments to use those methods of construction procurement, and the Procurement Appeals Board, designed to serve as an administrative appeal mechanism for procurements of goods and services. Although the Section no longer handles construction claims and litigation, it does provide advice to agencies and the Construction Litigation Section on construction procurement, contract management and dispute resolution issues on all construction matters except projects of the Virginia Department of Transportation.

Of particular interest, RELUS continued to serve as the General Counsel to the Fort Monroe Authority (FMA) and counsel to the Governor on all matters related to Fort Monroe. Fort Monroe was listed on the 2005 BRAC closure list and is scheduled to close in September 2011. Upon closing, approximately 2/3 of the land area will revert to the Commonwealth and 1/6 is federal surplus; the remaining 1/6 is disputed as to whether it reverts or is federal surplus. In 2010, the Section reviewed and analyzed proposed amendments to the Fort Monroe Authority Act; collaborated with outside counsel to create a Fort Monroe Foundation and have it recognized by the IRS as a 501(c)(3) charitable organization; worked with outside BRAC counsel and negotiated with Army personnel regarding the conveyance of all excess property in order to consolidate ownership of all of the property in the Commonwealth; worked with FMA staff and consultants on negotiations with utilities providers to explore options for the provision of

municipal utilities and emergency services once the Army leaves; participated in negotiations for a Master Lease agreement with the Army to allow the FMA to lease empty buildings to private parties prior to closure; cooperated with the City of Hampton to define the working relationship between the City, as municipal government, and the FMA, as managing entity for the Commonwealth; and worked on a myriad of other issues of varying complexity.

Additionally, the Section continued its assistance to Norfolk State University (NSU) with respect to issues involving the Light Rail Transit Project in Norfolk. RELUS has provided and continues to provide significant legal support to NSU, which has included determining the properties affected, strategizing regarding the real needs of the University and negotiating with the City of Norfolk and Hampton Roads Transit to achieve those goals without jeopardizing the light rail project.

During 2010, the Section opened 294 new matters, closing 230 matters during the year. At the end of 2010, the Section was handling 368 active cases with a declared value in excess of \$1.2 billion.

Environmental Section

The Environmental Section primarily represents agencies under the Secretary of Natural Resources, as well as the Department of Mines, Minerals and Energy, the Department of Forestry, and the Environmental Health Division of the Virginia Department of Health. Section attorneys provide a range of legal services, including litigation, regulation and legislation review, transactional work, representation in personnel issues, and related matters.

In 2010, the Section represented the State Water Control Board (SWCB) in an action brought by the Blue Ridge Environmental Defense League (the League) and others to seek judicial review of the Virginia Pollutant Discharge Elimination System permit issued by the SWCB to Dominion Power. The permit authorized Dominion to discharge from its North Anna Nuclear Power Station into Lake Anna. The League argued, in part, that the permit failed to regulate properly the discharge of thermal pollution into the facility's waste heat treatment facility and thus failed to protect water quality standards in the waste heat treatment facility and in Lake Anna itself. Although the circuit court set aside the permit, on appeal the Court of Appeals of Virginia reversed the lower court's ruling. In a published opinion, the Court of Appeals held that "the SWCB's decision not to regulate the waste heat treatment facility based on its determination that it fell under the 'waste heat treatment system' exemption was not arbitrary or capricious constituting an abuse of its delegated discretion, and, thus, the circuit court erred in not according deference to the SWCB in its construction of its own regulations and erred further in not permitting the SWCB to defer to the EPA's construction of federal regulations." The Supreme Court of Virginia granted the League's appeal in 2011.

The Section also represented the Virginia Marine Resources Commission in an appeal of a permit it issued to the City of Virginia Beach to place a concrete pipe and outfall structure on state-owned bottomland channelward of the mean low water mark. The permit was challenged by twenty-nine residents of Virginia Beach who live in the vicinity of a proposed upland pumphouse that will be part of a stormwater removal system that will connect to the pipe and outfall structure. The circuit court dismissed the case for failure to allege facts sufficient to establish standing, but the Court of Appeals

reversed and remanded for an evidentiary hearing to determine if the residents had been aggrieved. The Court of Appeals further held that, because the Rules of the Supreme Court do not expressly require an appellant in an APA appeal to plead facts sufficient to establish standing, no such requirement exists. Maintaining that, regardless of the Rules' silence, there are fundamental pleading requirements in all matters, the City and the Commission filed a Petition for Appeal with the Supreme Court of Virginia.

On behalf of the Commonwealth, the Section participated in two EPA/DOJ stormwater management enforcement cases against national homebuilders Beazer Homes USA, Inc. and Hovnanian Enterprises, Inc. In settling the cases, the companies agreed to pay fines for Clean Water Act violations in multiple states, including Virginia, and to implement company-wide stormwater programs to improve compliance with stormwater runoff requirements at current and future construction sites around the country.

The Section also represented the Soil and Water Conservation Board in bringing a stormwater management enforcement action against Fluor-Lane LLC, who is constructing the I-495 I-495 High Occupancy Toll lanes in Fairfax County. The case was settled by a Consent Decree that will result in significantly reduced stormwater runoff from the \$1.4 billion, 830-acre construction site, while keeping the traffic congestion-reducing project on schedule. As part of the settlement, Fluor-Lane will implement an enhanced inspection and maintenance program that incorporates a daily inspection schedule, as well as training, reporting, and recordkeeping requirements. In addition, the plan provides for weekly audits by an independent auditor to ensure that Fluor-Lane accurately identifies any noncompliance and makes timely corrective actions. Additionally, Fluor-Lane will pay a civil penalty of \$66,450 for alleged past violations.

Financial Law and Government Support Section

The Financial Law and Government Support Section provides legal counsel to agencies and boards reporting to the Secretaries of Administration, Commerce and Trade, Agriculture and Forestry and Finance. These agencies and boards include the Department of Agriculture and Consumer Services, the Department of Professional and Occupational Regulation, the Department of Taxation, the Department of the Treasury, the Virginia Economic Development Partnership, Virginia Employment Commission, the Virginia Resources Authority, and the State Board of Elections.

The Section also provides advice to certain Public Safety agencies, specifically, the Department of Alcoholic Beverage Control (ABC), the Department of Veterans' Services and the Virginia War Memorial, and to the following independent agencies: the Department of the Lottery and the Virginia Retirement System. In addition, this Section works with constitutional officers and local government attorneys to assist in the resolution of issues of local concern as they arise.

The number of unemployment benefit appeals from the Virginia Employment Commission defended by this Section has increased substantially because of the fragile state of the economy. The Virginia Employment Commission was served with 165 petitions for judicial review in 2010, a record number that followed 101 petitions in 2009, 81 petitions in 2008 and 68 petitions in 2007. As a consequence, the caseload for this Section is much larger, often necessitating multiple court appearances per week. The Court of Appeals issued two published opinions relating to unemployment benefits in 2010.

This Section also handles a significant volume of litigation for the Department of Taxation regarding state tax assessments with respect to individual and corporate income taxes and retail sales and use taxes. This caseload includes complex litigation regarding conservation easement tax credits. In addition, on behalf of ABC, the Section successfully litigated 15 appeals of administrative actions at the circuit court level, one of which was appealed to the Court of Appeals. The Section also responded to 40 requests for assistance from animal control, law enforcement and commonwealth's attorneys regarding animal neglect/cruelty, dangerous dog and dog fighting cases throughout the Commonwealth. In July, the Section successfully prosecuted an individual for animal cruelty, under a special prosecution arrangement with the Chesterfield Commonwealth's Attorney.

Transportation Section

The Transportation Section represents and advises the state agencies and boards that report or are assigned to the Secretary of Transportation. These agencies and boards include: the Virginia Department of Transportation (VDOT), the Commonwealth Transportation Board, the Department of Motor Vehicles, the Commission on the Virginia Alcohol Safety Action Program (VASAP), the Department of Rail and Public Transportation, the Virginia Port Authority, the Virginia Port Authority Board of Commissioners, the Virginia Department of Aviation, the Virginia Aviation Board, the Motor Vehicle Dealer Board, the Board of Towing and Recovery Operators and most recently, the Virginia Commercial Space Flight Authority. The Section also advises and represents the Secretary of Transportation.

The Section attorneys serve the transportation client agencies in numerous administrative, regulatory, transactional/contractual and litigation matters, including contract negotiation, drafting and disputes; eminent domain/condemnation issues and litigation; land use issues; outdoor advertising and signage issues relating to right of way; personnel issues; environmental issues; procurement disputes; titling and registration of automobiles; licensure and regulation of drivers; motor fuels tax collection and enforcement; licensure and regulation and discipline of motor vehicle dealers; administration of motor vehicle dealer franchise laws and regulation of disputes between franchise dealers and manufacturers; licensure and regulation of towing and recovery operators, administration of the VASAP program, legislative reviews, rail and other grant agreement drafting and negotiation; freedom of information requests; conflict of interest questions; and administrative hearings involving a wide array of issues and several different agencies.

In 2010, attorneys in the Section appeared in state and federal courts throughout Virginia, including the Supreme Court of Virginia, to represent and protect the Commonwealth's interests in litigation. For example, the Section defended the Commonwealth in a number of National Environmental Policy Act (NEPA) cases brought by individuals and nonprofit interest groups challenging transportation projects for I-66 spot improvements inside the Capital Beltway, I-73 construction, and I-81 widening. The Section also defended the Commonwealth in an action brought by Arlington County to challenge the I-95/I-395 High Occupancy Toll Lanes project, in which the county alleged violations of NEPA and named several state and federal officials as defendants in their individual capacities.

Other significant cases in which the Section defended the Commonwealth included: a landowner's attempt to invalidate the transfer (to the Metropolitan Washington Airports Authority) of operation and maintenance of the Dulles Toll Road and construction of the Dulles Metrorail project; and an inverse condemnation case seeking \$9 million in damages claimed by over 100 landowners in Fairfax County, after a severe rain event in 2006 caused flooding in other portions of Northern Virginia and in the District of Columbia. Eminent domain proceedings included issues related to: landowners' claims for damages from road projects that had resulted in changes in access to a shopping center and an apartment complex and a restaurant chain's claim for compensation for personal property in a restaurant when the real property was taken for a road widening project.

The Public-Private Transportation Act (PPTA) continues to be a major endeavor for the Section. In 2010, KPMG performed an audit of the PPTA program in the Commonwealth. The results of the audit included significant recommendations for the improvement of the PPTA program, and the Section has been advising and assisting VDOT in implementation of those recommendations. The Section also has advised VDOT with respect to PPTA projects and proposals at various stages in the PPTA process.

This Section also assisted in extensive negotiations between the Virginia Port Authority (VPA), Virginia International Terminals (VIT) and AP Moller (APM) relating to lease of the APM Terminal by VIT or the VPA. The parties ultimately signed a 20-year lease for the APM Terminal. The section also has been heavily involved in negotiations concerning the development of passenger rail service throughout the Commonwealth.

LEGISLATIVE ACCOMPLISHMENTS

During the 2010 Session of the General Assembly, the Office of the Attorney General worked to implement legislation to advance the health, safety, civil rights and quality of life of the citizens of Virginia. The legislative agenda addressed the effect of the United States Supreme Court decision in *Melendez-Diaz vs. Massachusetts* and included measures related to mental health issues, voting rights, public safety, consumer protection and government accountability.

In *Melendez-Diaz vs. Massachusetts*, the Supreme Court of the United States held that expert testimony is required to be presented in prosecutions involving forensic evidence. To minimize the financial cost to the Commonwealth of compliance, while ensuring the integrity of the prosecutions, the General Assembly enhanced the improvements it had enacted during the 2009 Special Session. Among the initiatives passed in 2010 were bills to codify the use and admissibility of a certificate of analysis and reports prepared by lab analysts without the testimony of the person who prepared such certificate or report. The legislature also adopted a measure that allows the testimony of a forensic analyst to be made via video teleconference rather than in person. These alternatives to ensure expert testimony is presented require the consent of the accused.

Through the hard work of many and with broad bipartisan support, legislation was passed to clarify and improve the involuntary commitment process for mental health consumers in Virginia. One measure involved permitting a court to enter an order for

mandatory outpatient treatment following involuntary inpatient treatments. Another enactment clarified the appeal process for a civil commitment order. The General Assembly also addressed the system through which inmates housed in a local correctional facility can be involuntarily admitted to receive needed treatment in a mental health facility.

The Office also fought for a measure requiring local registrars to send absentee ballots to oversee and military voters in a timely fashion. This new election guideline requires that absentee ballots be available 45 days before all elections to enable all voters sufficient time to vote absentee if they will be unable to vote in person. The bill specifically references the rights of the military to have all the necessary means to ensure their right to vote.

This Office was proud to work with the House and Senate on numerous initiatives to improve the safety of all Virginians. For example, the General Assembly passed the fetal homicide law, which establishes, for the purpose of homicide charges, that a human infant is an independent and separate being, regardless of whether the umbilical cord has been cut or the placenta remains attached. Also, the fight against juvenile gang violence was advanced by allowing the Department of Justice to share its records and reports with law enforcement officers to aid in gang-related criminal investigations. In addition, this office worked to allow a petitioner to obtain extensions of protective orders for up to two years if a threat still exists with no limit to the number of extensions. The Office also advocated for a bill to expand eligibility for the death penalty to include the murder of auxiliary police officers and auxiliary deputy sheriffs.

Another successful legislative effort by this office was aimed at protecting consumers. The Virginia Consumer Protection Act was expanded to include sales or lease of goods or services to a church or other religious body.

Finally, this Office worked closely with legislators and others to address another issue that received significant public attention in 2010: legislator accountability. Because of these efforts, members of the General Assembly are now required to disclose any income, other than that derived from serving in the legislature, in excess of \$10,000 paid to him or his family for employment with a state or local government or advisory agency. In addition, 2010 legislation provides that investigations of legislators by the House and Senate Ethics Advisory Panels are to be completed, notwithstanding the resignation of the legislator.

OPINIONS SECTION

The Opinions Section comprises the Opinions Counsel and the Publications Coordinator. The Section processes and manages requests made pursuant to § 2.2-505 for official opinions of the Attorney General as well as conflict of interests opinions for state and local government officers and employees and members of the General Assembly. The Section also handles confidential informal opinions that are issued by the Opinions Counsel. Based on the subject matter of the opinion request, opinions are assigned to attorneys within all Divisions of the Office. In 2010, the Opinions Section received 142 opinion requests, including requests not statutorily entitled to a response, that were withdrawn or were answered by previously issued opinions. The Office issued 114 official, informal and conflict of interest opinions in 2010, including the 82 official opinions published in this report that are also available on the OAG website. The

Opinions Section is responsible for publishing the Annual Report of the Office of the Attorney General that is mandated by § 2.2-516 and presenting it the Governor of Virginia on May 1st.

CONCLUSION

It is an honor and pleasure to serve the citizens of the Commonwealth as Attorney General. The achievements of the attorneys and staff of this Office are many, and while it is impossible to include all of their accomplishments in this report, the names of the dedicated professionals who served the Office last year are listed on the following pages. The citizens of the Commonwealth are well served by the efforts of these individuals.

With kindest regards, I am

Very truly yours,

A handwritten signature in dark ink, appearing to read "Ken Cuccinelli II", with a stylized flourish at the end.

Kenneth T. Cuccinelli II
Attorney General

PERSONNEL OF THE OFFICE¹

Kenneth T. Cuccinelli II.....	Attorney General
William C. Mims	Attorney General
Charles E. James Jr.	Chief Deputy Attorney General
Martin L. Kent	Chief Deputy Attorney General
Stephanie L. Hamlett	Senior Counsel to the Attorney General
Marla G. Decker.....	Deputy Attorney General
G. Michael Favale.....	Deputy Attorney General
Lisa M. Hicks-Thomas.....	Deputy Attorney General
David E. Johnson	Deputy Attorney General
Maureen R. Matsen	Deputy Attorney General
Richard F. Neel Jr	Deputy Attorney General
Wesley G. Russell Jr	Deputy Attorney General
E. Duncan Getchell Jr	Solicitor General of Virginia
Stephen R. McCullough.....	Opinions Counsel/Senior Appellate Counsel
Elizabeth A. Andrews	Sr. Assistant Attorney General/Chief
C. Meade Browder Jr	Sr. Assistant Attorney General/Chief
Craig M. Burshem.....	Sr. Assistant Attorney General/Chief
Roger L. Chaffe	Sr. Assistant Attorney General/Chief
Patrick W. Dorgan	Sr. Assistant Attorney General/Chief
Samuel E. Fishel IV	Sr. Assistant Attorney General/Chief
Ronald C. Forehand	Sr. Assistant Attorney General/Chief
Christy E. Harris-Lipford.....	Sr. Assistant Attorney General/Chief
Jane D. Hickey	Sr. Assistant Attorney General/Chief
James W. Hopper	Sr. Assistant Attorney General/Chief
David B. Irvin	Sr. Assistant Attorney General/Chief
Alan Katz	Sr. Assistant Attorney General/Chief
Joshua N. Lief.....	Sr. Assistant Attorney General/Chief
JoAnne P. Maxwell.....	Sr. Assistant Attorney General/Chief
Richard T. McGrath	Sr. Assistant Attorney General/Chief
Peter R. Messitt.....	Sr. Assistant Attorney General/Chief
Steven O. Owens.....	Sr. Assistant Attorney General/Chief
Kim F. Piner.....	Sr. Assistant Attorney General/Chief
Pamela A. Sargent.....	Sr. Assistant Attorney General/Chief
Jerry P. Slonaker	Sr. Assistant Attorney General/Chief
Allyson K. Tysinger.....	Sr. Assistant Attorney General/Chief
John S. Westrick	Sr. Assistant Attorney General/Chief
Steven T. Buck.....	Chief Section Counsel
Robert H. Anderson III	Senior Assistant Attorney General

¹ This list includes all persons employed and compensated by the Office of the Attorney General during calendar year 2010, as provided by the Office's Division of Administration. The most recent title is used for any employee whose position changed during the year.

Nancy C. Auth	Senior Assistant Attorney General
Howard M. Casway	Senior Assistant Attorney General
George W. Chabalewski	Senior Assistant Attorney General
Ellen E. Coates	Senior Assistant Attorney General
Gary L. Conover	Senior Assistant Attorney General
Leah A. Darron	Senior Assistant Attorney General
Mark R. Davis	Senior Assistant Attorney General
Matthew P. Dullaghan	Senior Assistant Attorney General
Christopher D. Eib	Senior Assistant Attorney General
Suzanne T. Ellison	Senior Assistant Attorney General
Donald R. Ferguson	Senior Assistant Attorney General
Eric K.G. Fiske	Senior Assistant Attorney General
Gregory C. Fleming	Senior Assistant Attorney General
Wayne T. Halbleib	Senior Assistant Attorney General
Catherina F. Hutchins	Senior Assistant Attorney General
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Frederick R. Kozak	Senior Assistant Attorney General
Donald A. Lahy	Senior Assistant Attorney General
Alison P. Landry	Senior Assistant Attorney General
J. Christopher Lemons	Senior Assistant Attorney General
Deborah A. Love	Senior Assistant Attorney General
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Kathleen B. Martin	Senior Assistant Attorney General
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William W. Muse	Senior Assistant Attorney General
Richard E. Nance	Senior Assistant Attorney General
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Deanis L. Simmons	Senior Assistant Attorney General
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Cheryl A. Wilkerson	Senior Assistant Attorney General
Steven A. Witmer	Senior Assistant Attorney General
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Jeffrey R. Allen.....	Assistant Attorney General
Sarah O. Allen.....	Assistant Attorney General
Alice T. Armstrong.....	Assistant Attorney General
Karri B. Atwood.....	Assistant Attorney General
Angela B. Axselle.....	Assistant Attorney General
Rachel J. Baer.....	Assistant Attorney General
Susan F. Barr.....	Assistant Attorney General
Jacob L. Belue.....	Assistant Attorney General
Angela Benjamin-Daniels.....	Assistant Attorney General
John W. Blanton.....	Assistant Attorney General
Kimberly M. Bolton.....	Assistant Attorney General
Rosemary V. Bourne.....	Assistant Attorney General
Ryan J. Brown.....	Assistant Attorney General
Vivian F. Brown.....	Assistant Attorney General
J. Robert Bryden II.....	Assistant Attorney General
Matthew M. Cobb.....	Assistant Attorney General
Carla R. Collins.....	Assistant Attorney General
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Elizabeth L. Fitzgerald.....	Assistant Attorney General
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Paul Kugelman Jr.....	Assistant Attorney General

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Lawrence L. Muir Jr	Assistant Attorney General
Sean J. Murphy	Assistant Attorney General
Valerie L. Myers	Assistant Attorney General
Carrie S. Nee	Assistant Attorney General
Adele M. Neiburg	Assistant Attorney General
Thomas W. Nesbitt	Assistant Attorney General
Kerri L. Nicholas	Assistant Attorney General
Kevin C. Nunnally	Assistant Attorney General
Patrick O. O’Leary	Assistant Attorney General
Joseph C. Obenshain.....	Assistant Attorney General
J. Michael Parsons	Assistant Attorney General
R. Thomas Payne II.....	Assistant Attorney General
Elizabeth B. Peay	Assistant Attorney General
Kiva Bland Pierce	Assistant Attorney General
Alisson O. Pouille	Assistant Attorney General
Lori L. Pound	Assistant Attorney General
Charles A. Quagliato.....	Assistant Attorney General
D. Mathias Roussy Jr	Assistant Attorney General
Tracey D.S. Sanders.....	Assistant Attorney General
Greer D. Saunders.....	Assistant Attorney General
James E. Schliessmann	Assistant Attorney General
Noëlle L. Shaw-Bell.....	Assistant Attorney General
Susan H. Siegfried	Assistant Attorney General
Kara C. Smith.....	Assistant Attorney General
Craig W. Stallard	Assistant Attorney General
Christopher D. Supino	Assistant Attorney General
J. David Taranto.....	Assistant Attorney General
Shannon Y. Taylor	Assistant Attorney General
Banci E. Tewolde.....	Assistant Attorney General
Richard H. Traylor	Assistant Attorney General
Crystal Y. Twitty	Assistant Attorney General
Samantha D. Vanterpool	Assistant Attorney General
K. Michelle Welch	Assistant Attorney General
Steven M. Westermann	Assistant Attorney General
Josephine F. Whalen	Assistant Attorney General
Erin Dugan Whealton	Assistant Attorney General
Julie M. Whitlock.....	Assistant Attorney General
Jennifer C. Williamson	Assistant Attorney General

Randall H. Wintory	Assistant Attorney General
Corie Tillman Wolf	Assistant Attorney General
Daniel S. Wolf	Assistant Attorney General
Susan B. Curwood	Asst. Att’y Gen./Dir., Tobacco Enforcement Unit
Eric A. Gregory	Asst. Att’y Gen./Dir., Compliance & Special Counsel
Phillip O. Figura	Assistant Attorney General/Gang Prosecutor
Vaso Tahim Doubles	Assistant Attorney General/Prosecutor
Steven W. Grist	Assistant Attorney General/Prosecutor
Janine M. Myatt	Assistant Attorney General/Prosecutor
Marc J. Birnbaum	Assistant Attorney General/SAUSA
Cameron M. Rountree	Assistant Attorney General/SAUSA
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Michael T. Judge	Deputy Director, Prosecutions & Litigation
Joseph E.H. Atkinson	Lead Attorney/Assistant Attorney General
Lelia P. Beck	Lead Attorney/Assistant Attorney General
W. Clay Garrett	Lead Attorney/Assistant Attorney General
Courtney M. Malveaux	Special Counsel Manager/Asst. Att’y Gen.
Thomas D. Bagwell	Special Assistant Attorney General
John R. Butcher	Special Assistant Attorney General
Frederick S. Fisher	Special Assistant Attorney General
Guy W. Horsley Jr	Special Assistant Attorney General
Megan Boyle Larkin	Special Assistant Attorney General
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Richard B. Smith	Special Assistant Attorney General
George Z. Terwilliger	Special Assistant Attorney General
Crystal V. Adams	Legal Secretary Senior
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Juanita Balenger	Community Outreach and TRIAD Director
Andrew P. Barone	Senior Investigator
Delilah Beaner	Administrative Legal Secretary Senior
Kiana M. Beekman	Investigator
Mary H. Blackburn	Senior Financial Investigator
Heather K. Blanchard	Paralegal Senior
Carolyn R. Blaylock	Legal Secretary Senior
Daniel M. Booth	Financial Investigator
Charles D. Branson	Senior Criminal Investigator

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Charles R. Calton	Claims Representative
Daniel W. Carlson	Criminal Investigator
Philip J. Caudery	Investigator
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Harrison L. Clark	Director of Administration
David E. Clementson	Director of Communications
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Montrue H. Goldfarb	Paralegal Senior
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Laura T. Jennings	Legal Secretary Senior
Terri C. Jernigan	Legal Secretary
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Genea C.P. Johnson	Paralegal
Kevin M. Johnson	Senior Criminal Investigator
Tierra G. Johnson	Legal Secretary Senior
Tyrone Johnson Jr.	Legal Secretary
Jon M. Johnston	Senior Criminal Investigator
Scott D. Jones	Senior Criminal Investigator
Tammy P. Kagey	Paralegal Senior Expert
Hyo J. Kang	Senior Database Administrator/Developer
Anne D. Kellum	Investigator
Debra M. Kilpatrick	Procurement Officer
Chrystal L. Knighton	Programmer Supervisor
Jacqueline A. Kotvas	Special Assistant, Community Relations
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Mary Anne Lange	Paralegal
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Patricia M. Lewis	Unit Program Coordinator
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Deborah L. Madison	Director of Information Systems

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Sara I. Martin.....	Human Resources Analyst
Tomisha R. Martin.....	Claims Specialist
Joshua A. Marwitz.....	Investigator
Aaron M. Mathes.....	Chief Information Officer
Melinda R. Matzell.....	Senior Criminal Investigator
Amanda McGuire.....	Publications Coordinator
Judy O. McGuire.....	Claims Representative
Regina M. McKennen.....	Investigator
George T. McLaughlin.....	Investigator/Forensic Examiner
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David J. Miller.....	Investigator
Lynice D. Mitchell.....	Office Services Specialist Senior
James B. Mixon Jr.....	Analyst/Community Outreach Coordinator
Eda M. Montgomery.....	Senior Financial Investigator
Howard M. Mulholland.....	FCIC Financial Investigator
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Elizabeth M. Myers.....	Paralegal
Mary C. Nevetral.....	Receptionist
Connie J. Newcomb.....	Director of Office Operations
Carol G. Nixon.....	Auditor
Timothy E. Northcutt.....	Investigator
Trudy A. Oliver-Cuoghi.....	Paralegal
Jennifer L. Onusconich.....	Paralegal
Sheila B. Overton.....	Internet Services Administrator
Wayne J. Ozmore Jr.....	Senior Criminal Investigator
Janice R. Pace.....	Payroll Manager
Sharon P. Pannell.....	Legal Secretary Senior
John W. Peirce.....	Senior Criminal Investigator
Coty D. Pelletier.....	Investigator
Jane A. Perkins.....	Paralegal Senior Expert
Bruce W. Popp.....	Deputy Director, Information Systems
Bobby N. Powell.....	Civil Investigator
Jacquelin T. Powell.....	Legal Secretary Senior Expert
Jennifer L. Powell.....	Administrative Legal Secretary Senior
Sandra L. Powell.....	Legal Secretary Senior
N. Jean Redford.....	Legal Secretary Senior Expert
Luvenia C. Richards.....	Legal Secretary
David A. Risdén.....	Investigator
Melissa A. Roberson.....	Program Coordinator/Domestic Violence
Linda M. Roberts.....	Senior Receptionist

Noah B. Rogers	Scheduler
April D. Rogers-Crawford	Gang Awareness Coordinator
Hamilton J. Roye	Administrative Coordinator
Joseph M. Rusek	MFCU Investigative Supervisor
Lisa W. Seaborn.....	Publications Coordinator
Pamela A. Sekulich.....	Financial Services Specialist II
Bernard J. Shamblin.....	Senior Criminal Investigator
Elizabeth G. Sherron.....	Senior Financial Investigator
Terry L. Sivert.....	Criminal Investigator
Debra L. Smith.....	Administrative Legal Secretary Senior
Faye H. Smith	Human Resource Manager I
Jameen C. Smith	Claims Specialist Senior
Jessica C. Smith.....	Administrative Legal Secy. Sr./PS Init. Coordinator
Ryan J. Sneddon.....	Deputy Scheduler and Press Assistant
Cheryl L. Snyder.....	Legal Secretary
Michele A. Stanley.....	Investigator
Kimberly F. Steinhoff.....	Executive Assistant to the Attorney General
Victoria G. Stewart	Legal Secretary
Eva A. Stuart.....	Constituent Services Administrator
Rhonda H. Suggs	Paralegal Senior
Mary Sullivan.....	Criminal Investigator
Gregory G. Taylor.....	Claims Representative
Katherine E. Terry	Community Outreach Coordinator
Patricia S. Thomas	Nurse Investigator
Erin K. Thompson.....	Investigator
James M. Trussell	Regional Support Systems Engineer
Lynda Turrieta-McLeod.....	Legal Secretary Senior
Latarsha Y. Tyler	Legal Secretary
Patricia L. Tyler	Paralegal Senior Expert/Manager
Corrine Vaughan.....	Program Director, Victim Notification
Cassidy F. Vesta.....	Administrative Secretary Senior
Kathleen B. Walker.....	Program Assistant, Victim Notification Program
Patricia J. Wash.....	Legal Secretary
Pamelia D. Watts.....	Exec. Asst. to the Chief Deputy Attorney General
Nanora W. Westbrook....	Program Asst. Sr., Victim Notification Program
Kimberly Wilborn.....	Paralegal
M. Donette Williams.....	Paralegal
Brenda K. Wright.....	Legal Secretary Senior Expert
Michael J. Wyatt	Investigator
Abigail T. Yawn.....	Legal Secretary Senior
James A. Zamparello	Investigator

ATTORNEYS GENERAL OF VIRGINIA 1776 – 2010

Edmund Randolph	1776–1786
James Innes	1786–1796
Robert Brooke	1796–1799
Philip Norborne Nicholas	1799–1819
John Robertson	1819–1834
Sidney S. Baxter	1834–1852
Willis P. Bocock	1852–1857
John Randolph Tucker	1857–1865
Thomas Russell Bowden	1865–1869
Charles Whittlesey (military appointee)	1869–1870
James C. Taylor	1870–1874
Raleigh T. Daniel	1874–1877
James G. Field	1877–1882
Frank S. Blair	1882–1886
Rufus A. Ayers	1886–1890
R. Taylor Scott	1890–1897
R. Carter Scott	1897–1898
A.J. Montague	1898–1902
William A. Anderson	1902–1910
Samuel W. Williams	1910–1914
John Garland Pollard	1914–1918
J.D. Hank Jr. ²	1918–1918
John R. Saunders	1918–1934
Abram P. Staples ³	1934–1947
Harvey B. Apperson ⁴	1947–1948
J. Lindsay Almond Jr. ⁵	1948–1957
Kenneth C. Patty ⁶	1957–1958
A.S. Harrison Jr.	1958–1961
Frederick T. Gray ⁷	1961–1962
Robert Y. Button	1962–1970

² The Honorable J.D. Hank Jr. was appointed Attorney General on January 5, 1918, to fill the unexpired term of the Honorable John Garland Pollard, and served until February 1, 1918.

³ The Honorable Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of the Honorable John R. Saunders, and served until October 6, 1947.

⁴ The Honorable Harvey B. Apperson was appointed Attorney General on October 7, 1947, to fill the unexpired term of the Honorable Abram P. Staples, and served until his death on January 31, 1948.

⁵ The Honorable J. Lindsay Almond Jr. was elected Attorney General by the General Assembly on February 11, 1948, to fill the unexpired term of the Honorable Harvey B. Apperson, and resigned September 16, 1957.

⁶ The Honorable Kenneth C. Patty was appointed Attorney General on September 16, 1957, to fill the unexpired term of the Honorable J. Lindsay Almond Jr., and served until January 13, 1958.

⁷ The Honorable Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of the Honorable A.S. Harrison Jr. upon his resignation on April 30, 1961, and served until January 13, 1962.

Andrew P. Miller	1970–1977
Anthony F. Troy ⁸	1977–1978
John Marshall Coleman	1978–1982
Gerald L. Baliles	1982–1985
William G. Broaddus ⁹	1985–1986
Mary Sue Terry	1986–1993
Stephen D. Rosenthal ¹⁰	1993–1994
James S. Gilmore III	1994–1997
Richard Cullen ¹¹	1997–1998
Mark L. Earley	1998–2001
Randolph A. Beales ¹²	2001–2002
Jerry W. Kilgore	2002–2005
Judith Williams Jagdmann ¹³	2005–2006
Robert F. McDonnell	2006–2009
William C. Mims ¹⁴	2009–2010
Kenneth T. Cuccinelli II	2010–

⁸ The Honorable Anthony F. Troy was elected Attorney General by the General Assembly on January 26, 1977, to fill the unexpired term of the Honorable Andrew P. Miller upon his resignation on January 17, 1977, and served until January 14, 1978.

⁹ The Honorable William G. Broaddus was appointed Attorney General on July 1, 1985, to fill the unexpired term of the Honorable Gerald L. Baliles upon his resignation on June 30, 1985, and served until January 10, 1986.

¹⁰ The Honorable Stephen D. Rosenthal was elected Attorney General by the General Assembly on January 29, 1993, to fill the unexpired term of the Honorable Mary Sue Terry upon her resignation on January 28, 1993, and served until noon, January 15, 1994.

¹¹ The Honorable Richard Cullen was appointed Attorney General to fill the unexpired term of the Honorable James S. Gilmore III upon his resignation on June 11, 1997, at noon, and served until noon, January 17, 1998.

¹² The Honorable Randolph A. Beales was elected Attorney General by the General Assembly on July 10, 2001, and was sworn into office on July 11, 2001, to fill the unexpired term of the Honorable Mark L. Earley upon his resignation on June 4, 2001, and served until January 12, 2002.

¹³ The Honorable Judith Williams Jagdmann was elected Attorney General by the General Assembly on January 27, 2005, and was sworn into office on February 1, 2005, to fill the unexpired term of the Honorable Jerry W. Kilgore upon his resignation on February 1, 2005.

¹⁴ The Honorable William C. Mims was elected Attorney General by the General Assembly on February 26, 2009, and was sworn into office on February 27, 2009, to fill the unexpired term of the Honorable Robert F. McDonnell upon his resignation on February 20, 2009.

CASES
IN THE
SUPREME COURTS
OF
VIRGINIA
AND THE
UNITED STATES

CASES DECIDED IN THE SUPREME COURT OF VIRGINIA¹

Aguilar v. Commonwealth. Holding unanimously, on remand from the United States Supreme Court, affirming convictions for rape and robbery, that Aguilar's rights under the Confrontation Clause were not violated simply because lab technicians who assisted the analyst by preparing the sample were not called to testify by the prosecution.

AMEC Civil, LLC v. Dep't of Transportation. Affirming several rulings by the Court of Appeals, including ruling that no timely notice of intent to file a claim given, reversing ruling that high water not a differing site condition, and remanding the case to the trial court to recalculate damages.

Boyce v. Commonwealth. Affirming jury's determination that Boyce was a sexually violent predator.

Brown v. Virginia State Bar. Affirming three-judge panel decision suspending Brown's license to practice law for twelve months.

Conrod v. Virginia State Bar. Denying appeal of determination that a District Committee had substantial evidence in the record to support its finding that Conrod had violated ethical rules.

Digiacinto v. Rector & Visitors of G.M.U. Holding that the regulations concerning firearms on campus did not violate the Second Amendment and that the University could promulgate such regulations.

Gay v. Virginia State Bar. Dismissing appeal of suspension of license to practice law for 60 days due to various rule violations.

Graves v. Commonwealth. Affirming trial court's finding of SVP and commitment in that the hearsay by a deceased witness, that was admitted, was harmless error.

Green v. Virginia State Bar. Affirming Disciplinary Board's imposition and setting of effective date of seven-month suspension of license to practice law, which had been stayed by the Court pending the outcome of the appeal concerning the suspension.

Harris v. Commonwealth. Affirming court's decision that circuit court could look to indictment to clarify that Harris was guilty of abduction with intent to defile when conviction order was unclear.

Hood v. Commonwealth. Reversing decision that there is no statutory or constitutional requirement that an inmate be provided the assistance of counsel at a § 37.2-904 evaluation. The statute provides however, that respondent must have opportunity to confer with counsel.

In re Andrews. Dismissing petition for writ of mandamus and a motion to stay order directing Andrews to produce purportedly privileged documents.

In re Cattano Law Firm. Refusing petition for writ of mandamus against retired judge who purportedly refused to enter a final order and scheduled a hearing on attorney's fees.

¹ A complete listing of all the cases handled by the Office of the Attorney General is not reprinted in this Report. Only selected cases pending in or decided by the Supreme Court of Virginia and the Supreme Court of the United States are included, as required by § 2.2-516 of the *Code of Virginia*.

In re Harbison. Dismissing petition for writ of mandamus against judges to have several orders entered in divorce proceeding to be declared void, requesting monetary damages, and asking that various actions be taken against petitioner's wife.

In re Scott. Dismissing petition for writ of mandamus to vacate a 2001 pre-filing injunction and vacate the orders entered by judge so petitioner will be allowed to file his complaint.

In re Walker. Dismissing petition for writ of mandamus to require circuit court to sanction attorneys and to review the proceedings in the circuit court.

In re Ware. Refusing petition for writ of prohibition against judges of the ninth judicial circuit to prohibit the court from presiding over an upcoming hearing.

Kone v. Dep't of State Police. Dismissing appeal for denial of grievance appeal in Court of Appeals of Virginia.

Lawrence v. Commonwealth. Reversing jury's determination that Lawrence was a sexually violent predator, finding that the expert's testimony was hearsay and that opinions relied on hearsay allegations, and remanding the case for retrial.

Lee v. Southeastern Va Training Ctr. Affirming decision of hearing officer terminating Lee for patient abuse.

Ligon v. Goochland County. Affirming dismissal of state employee's suit against county, ruling that the retaliation protection afforded whistle-blowing relators under the Virginia Fraud Against Taxpayers Act did not abrogate sovereign immunity.

Manship v. Kaine. Denying petition for writ of mandamus against Governor seeking an order requiring him to change the election process in Virginia.

Moore v. Virginia Museum of Natural History. Denying appeal of dismissal of suit alleging termination due to sexual orientation.

Moseley v. Virginia State Bar. Affirming three-judge panel decision suspending attorney's license to practice law for a period of six months.

Protestant Episcopal Church in the Diocese of Va. v. Truro Church. We intervened to defend the constitutionality of our statute that governs church divisions. The Court ruled against the break-away congregations on the basis of statutory construction, thus avoiding the constitutional issue, remanded to the Fairfax County Circuit Court.

Sebok v. Virginia State Bar. Affirming the ruling of a three-judge panel that suspended petitioner's license to practice law for 3 months.

Shurtz v. Virginia State Bar. Affirming suspension of license to practice law for eighteen months for violation of Rules 1.4, 1.8 and 8.4.

Smith v. Commonwealth. Affirming court's decision that VCBR records were properly admitted as business records at annual review.

T.C. MidAtlantic Development, Inc. v. Dep't of General Services. Affirming decision by the trial court to sustain demurrer and remanding the case back to the trial court to decide issue not raised in demurrer.

Volkswagen of America, Inc. v. Smit. Vacating in part and reversing in part Court of Appeals decision and holding that the Court of Appeals erred in affirming a circuit court judgment upholding a decision of the Commissioner of the Department of Motor Vehicles that an automobile distributor violated Code § 46.2-1569(7) by failing to ship to a Virginia dealer a quantity of new vehicles that meets the statute's requirements, and erred in concluding that this statute was not vague as applied under the facts. Because the merits of the appeal was decided on the narrower basis of an "as applied" challenge to Code § 46.2-1569(7) under due process, the distributor's facial challenge to the statute based on dormant Commerce Clause principles was not considered.

Warrington v. Commonwealth. Affirming court's decision, where only procedural discrepancy in initiation of case was that expert did not have the treatment qualification did not amount to gross negligence.

Yancey v. Virginia State Bar. Dismissing appeal of three-judge panel decision of public reprimand without terms.

CASES PENDING IN THE SUPREME COURT OF VIRGINIA

Bazan-Alfaro v. Commonwealth-Dep't of Med. Assistance Servs. Appealing Circuit Court's decision that ruled the Commonwealth had a lien for the entire amount it paid for treatments received by Bazan-Alfaro and that awarded the Commonwealth a \$194,128.18 judgment.

Bell v. Commonwealth. Appealing sufficiency of evidence in finding that respondent is eligible for conditional release.

Blaxton v. Commonwealth. Appealing court's decision to release respondent on conditional release out-of-state.

Blue Ridge Environmental Defense League v. Commonwealth. Appealing Court of Appeals reversal of trial court ruling setting aside permit issued by State Water Control Board to Dominion Power for discharges from North Anna Nuclear Power Station.

Department of Corrections v. Estep. Appealing order directing the Department to reinstate an employee to a position that had been filled by another.

Doud v. Commonwealth. Appealing lower court decision granting Commonwealth's motion for summary judgment in a claim for failure to protect inmate beaten at county jail.

Duncan v. Virginia State Bar. Appealing three-judge panel's memorandum order suspending Duncan's license to practice law for two years.

FR Pike 7 Limited Partnership v. Commonwealth Transp. Comm'r. Appealing a jury award which allowed no compensation for damages for changes to access to a shopping center pursuant to a road project.

In re Gerald Kazembe. Petitioning for writ of mandamus against judge over denial of arbitration enforcement.

In re Morrissey. Appealing order denying petition for a writ of mandamus.

In re Oludare Ogunde. Petitioning for writ of mandamus to compel judge to enter final orders.

Livingston v. County of Fairfax and Va. Dep't of Transp. Appealing the trial court's grant of defendants' demurrer and the court's finding that a one-time instance of flooding caused by an extraordinary storm in July of 2006 did not give rise to a cause of action for inverse condemnation. Landowners alleged that the flooding was caused, among other things, by relocation of Cameron Run during construction of the Capital Beltway in the 1960's.

Montgomery County v. Va. Dep't of Rail and Public Transp. Appealing trial court's ruling upholding constitutionality of Rail Enhancement Fund statute in challenge to location of intermodal transportation facility.

Monticello Apartments Ltd. Partnership v. Commonwealth Transp. Comm'r. Appealing a jury award that allowed no compensation for damages for changes to access to an apartment complex pursuant to a road project.

Newport News v. Commonwealth. Appealing decision to have VaRisk 2 deemed to cover an Individuals with Disabilities Education Act action that school board lost at the federal level.

Pincus v. Virginia State Bar. Appealing three-judge panel sixty-day license suspension based on finding violation of Rules 1.3(a) and 1.5(b) of the Rules of Professional Conduct.

Taco Bell v. Commonwealth Transp. Comm'r. Appealing the trial court rulings on the determination of whether certain property was personal property or fixtures for purposes of awarding compensation in an eminent domain case.

Va. Marine Res. Comm'n v. Clark. Appealing Court of Appeals reversal of trial court dismissal of case for failure to allege facts sufficient to establish standing.

CASES REFUSED BY THE SUPREME COURT OF VIRGINIA

Brown v. Virginia State Bar. Refusing appeal of public reprimand with terms and six-month probation judgment rendered by a three-judge court in attorney disciplinary action.

Christian v. Commonwealth, ex rel. Cuccinelli. Refusing petition for appeal and finding no reversible error in judgments the Commonwealth obtained against the appellant in the amounts of \$8,606,500 for consumer restitution, \$1.7 million for civil penalties, and \$575,000 for attorney's fees, costs, and expenses in a case involving violations of the Virginia Consumer Protection Act.

Commonwealth v. Morris. Denying appeal of court's application of its *Lawrence* decision, deeming no reversible error.

Commonwealth Transp. Comm'r v. Fineblum. Refusing to hear Commissioner's appeal of an eminent domain award which exceeded the testimonial evidence presented at trial.

Commonwealth Transp. Comm'r v. Leave It To Beaver Child Care, LLC. Refusing to hear Commissioner's appeal of an eminent domain award in a road widening project which involved an award for property that the Commissioner believed had previously been dedicated/proffered in exchange for a zoning variance.

Harris v. Commonwealth Transp. Comm'r. Refusing to hear landowner's appeal of eminent domain award which provided no award of damages to the residue parcel.

CASES IN THE SUPREME COURT OF THE UNITED STATES

Aguilar v. Virginia. Petition for certiorari, raising Confrontation Clause issue regarding who must testify concerning the analysis of DNA, pending.

Amr v. Virginia State University. Petition for writ of certiorari for violation of due process and equal protection rights and being denied tenure for plagiarizing an academic paper submitted to the American Society of Engineering Educators, denied.

Bolls v. Street. Petition for rehearing of Board of Bar Examiners' denial of Freedom of Information Act requests for copies of exam answers of person who failed the exam, denied.

Briscoe v. Virginia. Confrontation Clause challenge to Virginia's now repealed statute, remanded to the Supreme Court of Virginia in a *per curiam* order.

Educational Media Co. v. Swecker. Petition for certiorari challenging a regulation of the ABC Board restricting advertisements in college newspapers, denied.

Kone v. Virginia Dep't of State Police. Petition for writ of certiorari of hearing officer's decision that allowed into evidence alleged falsified or forged documents and unsupported testimony about job performance, denied.

Lux v. Rodrigues. Petition for an emergency injunction challenging the constitutionality of a requirement placed on people who circulate petitions to add candidates to Virginia congressional ballots, denied.

Mills v. Midwest Title Loans, Inc. Petition stage amicus brief, supporting Indiana's argument that the authority of a state to regulate payday lenders allows it to regulate conduct from payday lenders that reaches into a neighboring state to solicit business from residents, denied.

Mitrano v. Virginia State Bar. Corrected and supplemental motion for an extension of time for writ of certiorari related to the revocation of license to practice law in Virginia, dismissed.

Sebelius v. Virginia. Petition for certiorari, asking the Court to rule that the Patient Protection and Affordable Care Act exceeded Congress's power under the Commerce Clause, the power to tax, and the Necessary and Proper Clause, pending.

Virginia v. Reinhard. Merits, challenging dismissal of lawsuit on the grounds of sovereign immunity, briefed and argued, decision is pending.

Wilson v. Johnson. Petition for certiorari from the United States Court of Appeals, seeking interlocutory review of a district court's decision refusing to appoint counsel, denied.

OFFICIAL OPINIONS
OF
ATTORNEY GENERAL
KENNETH T. CUCCINELLI II



Section 2.2-505 of the Code of Virginia authorizes the Attorney to render official written advisory opinions only when requested to do so the Governor; members of the General Assembly; judges and clerks of court of courts of record, and judges of courts not of record; the State Corporation Commission; Commonwealth's, county, city or town attorneys; sheriffs, treasurers and commissioners of the revenue; electoral board chairmen or secretaries; and state agency heads.

Each opinion in this report is preceded by an opinion number and a main headnote briefly describing the subject matter of the opinion. For purposes of citing an opinion, each opinion begins on the page on which the opinion number preceding the opinion first appears. Cite an opinion in this report as follows: 2010 Op. Va. Att'y Gen. __.

Opinions of the Attorney General beginning with opinions issued in January 1996, and Annual Reports of the Attorney General may be accessed on the Internet at www.vaag.com. Opinions of the Attorney General are also available on LEXISNEXIS, beginning with opinions issued in July 1958; on WESTLAW, beginning with opinions issued in 1976; and on CaseFinder, beginning with opinions from July 1976.



OP. NO. 10-048

ADMINISTRATION OF GOVERNMENT: STATE AND LOCAL CONFLICT OF INTERESTS ACT

EDUCATION: SCHOOL BOARDS; SELECTION, QUALIFICATION AND SALARIES OF MEMBERS

An employee of the Department of Health may operate a consulting business that specializes in radon testing, as long as the employee does so during nonworking hours in a manner that does not conflict with his responsibilities to the Commonwealth, and the business does not conflict with any Department of Health policies governing outside employment. An employee of the local school division may not serve on the school board of which she is an employee.

THE HONORABLE DAVE NUTTER

MEMBER, HOUSE OF DELEGATES

SEPTEMBER 10, 2010

ISSUES PRESENTED

You first ask whether an employee of a school division can seek election to and serve on the corresponding school board of the governing body while still employed by the school board. You also inquire whether a classified state employee who is employed by the Department of Health, whose duties do not include radon testing, can operate a consulting business that specializes in radon testing.

RESPONSE

It is my opinion that an employee of the local school division may not serve on the school board of which she is an employee. It is further my opinion that an employee of the Department of Health may operate a consulting business that specializes in radon testing, as long as the employee does so during nonworking hours in a manner that does not conflict with his responsibilities to the Commonwealth, and the business does not conflict with any Department of Health policies governing outside employment.

APPLICABLE LAW AND DISCUSSION

First, § 22.1-57.3(G) provides that “[n]o employee of a school board shall be eligible to serve on the board with whom he is employed.” Employees of a school division are considered employees of the school board.¹ The plain language of this provision would preclude an employee of the school board from serving on the school board.

Second, as an “employee” of a state “governmental agency,”² the Department of Health employee about whom you inquire⁴ is subject to the State and Local Government Conflict of Interests Act (the “Act”). The Act provides minimum rules of ethical conduct for state and local government officers and employees and contains three general types of restrictions and prohibitions: (1)³ it details certain types of conduct that are improper for such officers and employees; (2) it restricts the ability of such officers and employees to have personal interests in certain contracts with their own or other governmental agencies;⁶ and (3) it restricts the participation of such officers and

employees in transactions of their governmental agencies in which they have a personal interest.

There is no general prohibition against an employee of the Commonwealth engaging in part-time, outside employment as long as such activities do not conflict with or affect his employment with the Commonwealth and are consistent with the employing agency's policies concerning outside employment.

Based on the facts you present, the employee's official duties do not include radon testing. Therefore, there does not appear to be any overlap between official duties and private business. You do not indicate that the employee's business provides radon testing for the Department of Health, or for other state agencies. Assuming that is the case, the restrictions governing contracts between the employee and the agency for which he works, and other state agencies, do not come into play.⁸ To the extent the employee's official duties would call for him to participate in matters affecting the radon testing industry, the employee might have a "personal interest" in such a transaction and would have to disqualify himself from participating in such transactions.⁹

CONCLUSION

Accordingly, it is my opinion that an employee of the local school division may not serve on the school board. It is further my opinion that an employee of the Department of Health may operate a consulting business that specializes in radon testing, as long as the employee does so during nonworking hours in a manner that does not conflict with his responsibilities to the Commonwealth or with any Department of Health policies governing outside employment.

¹See, e.g., *Tazewell Cnty. Sch. Bd. v. Gillenwater*, 241 Va. 166, 167, 400 S.E.2d 199, 199 (1991) (teacher an employee of the school board); see also 2008 Op. Va. Att'y Gen. 43 (school bus driver an employee of the school board).

²"Employee" is defined as "all persons employed by a governmental or advisory agency, unless otherwise limited by the context of its use." VA. CODE ANN. § 2.2-3101 (2008). "'Governmental agency' means each component part of the ... executive ... branch[] of state ... government, including each ... board created by law to exercise some regulatory or sovereign power or duty as distinguished from purely advisory powers or duties." *Id.*

³"[F]or the purpose of establishing a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests, the General Assembly enacts [the] State and Local Government Conflict of Interests Act so that the standards of conduct for such officers and employees may be uniform throughout the Commonwealth." Section 2.2-3100 (2008).

⁴VA. CODE ANN. tit. 2.2, ch. 31, §§ 2.2-3100 to 2.2-3131 (2008 & Supp. 2010).

⁵See § 2.2-3103 (2008).

⁶See § 2.2-3106(A), (B) (2008).

⁷See § 2.2-3112(A)(1) (2008).

⁸See §§ 2.2-3106; 2.2-3112(A)(1).

⁹Section 2.2-3112(A)(1) (requiring that an employee disqualify himself from participating in a transaction in which the employee has a personal interest).

OP. NO. 10-020

ADMINISTRATION OF GOVERNMENT: VIRGINIA PUBLIC PROCUREMENT ACT

George Washington Regional Commission is not locality, authority, or sanitation district for purposes of competitive negotiation as defined in Act. Sum of all Commission projects performed in one contract term for architectural or professional engineering services related to construction projects may not exceed \$500,000.

THE HONORABLE ROBERT D. “BOBBY” ORROCK
MEMBER, HOUSE OF DELEGATES
APRIL 27, 2010

ISSUE PRESENTED

You ask whether the George Washington Regional Commission qualifies as a locality, authority, or sanitation district for purposes of the procurement of professional services under competitive negotiation as defined in § 2.2-4301. Further, pursuant to the Virginia Public Procurement Act, you ask whether the sum of the Commission’s contracts for architectural or professional engineering services contract may exceed \$500,000 for multiple construction projects.

RESPONSE

It is my opinion that the George Washington Regional Commission is not a locality, authority, or sanitation district for purposes of competitive negotiation as defined in § 2.2-4301. Therefore, it is my opinion that the sum of all the Commission’s projects performed in one contract term for architectural or professional engineering services related to construction projects may not exceed \$500,000.

APPLICABLE LAW AND DISCUSSION

The George Washington Regional Commission (“GWRC”) is a planning district commission, which includes the City of Fredericksburg and the Counties of Caroline, King George, Spotsylvania, and Stafford.¹ You indicate that GWRC wishes to establish a term contract for on-call design consultants. The Virginia Public Procurement Act² provides, in part, that:

A contract for architectural or professional engineering services relating to construction projects may be negotiated by a public body, for multiple projects Under such contract, ... the sum of all projects performed in one contract term shall not exceed \$500,000 or, in the case of a state agency, as defined in § 2.2-4347, such greater amount as may be determined by the Director of the Department of General Services, not to exceed \$1 million, except that in any locality or any authority or sanitation district with a population in excess of 80,000, the sum of all such projects shall not exceed \$5 million[.]^[3]

GWRC is not a sanitation district.⁴ Further, GWRC is not a “locality” as defined by General Assembly.⁵ Therefore, in order for GWRC to qualify for the exception to the contract limitation, it must be an “authority.”

The General Assembly has not defined the term “authority” for purposes of § 2.2-4301. It has, however, designated or authorized the creation of certain public entities as “authorities,”⁶ while designating or authorizing the creation of others as “commissions.”⁷ The *Virginia Code* constitutes a single body of law, and except where context indicates otherwise, it is presumed that its terms are used in a consistent manner.⁸ In my view, it would be incongruous to conclude that the term “authority” includes a planning district commission. The General Assembly has prescribed the terms that such districts may include in their name, and it does not permit the use of the term “authority.”⁹ Also, by including sanitation districts in the list of entities entitled to the exception to the contract limitation, the General Assembly indicates its intent to exclude other types of districts, such as planning districts.¹⁰

Finally, an interpretation that the term “authority,” as used in the definition of “competitive negotiation” in § 2.2-4301, includes a planning district commission would render superfluous the specific listing of “commission” in addition to “authority” in the definition of “public body” that is also contained in § 2.2-4301.¹¹ When the General Assembly intends to authorize a commission to do something, it knows how to express that intention.¹²

CONCLUSION

Accordingly, it is my opinion that the George Washington Regional Commission is not a locality, authority, or sanitation district for purposes of competitive negotiation as defined in § 2.2-4301. Therefore, it is my opinion that the sum of all the Commission’s projects performed in one contract term for architectural or professional engineering services related to construction projects may not exceed \$500,000.

¹ See <http://www.gwregion.org/> (last visited on April 9, 2010). I assume the correctness of this description for purposes of this opinion. Planning district commissions are created by agreement of localities comprising the district pursuant to the Regional Cooperation Act. See VA. CODE ANN. § 15.2-4203(A) (2008).

² See VA. CODE ANN. §§ 2.2-4300 to 2.2-4377 (2008 & Supp. 2009).

³ Section 2.2-4301 (Supp. 2009) (emphasis added) (defining “competitive negotiation”).

⁴ I note that sanitation districts are created under Title 21, e.g., § 21-145. Planning district commissions, such as GWRC, are created pursuant to § 15.2-4203(A), a portion of the Regional Cooperation Act.

⁵ See VA. CODE ANN. § 1-221 (2008) (defining “locality” as “a county, city, or town as the context may require”); see also § 1-202 (2008) (applying definitions in Chapter 2.1 of Title 1 to entire *Code* unless such construction is inconsistent with manifest intention of General Assembly).

⁶ See, e.g., § 15.2-4830 (2008) (creating Northern Virginia Transportation Authority); § 15.2-5102(A) (2008) (authorizing localities to create water authorities, sewer authorities, refuse collection and disposal authorities, or any combination thereof); § 15.2-5302 (2008) (mandating that cities establish hospital authorities); § 15.2-5403 (2008) (authorizing governing bodies of government units to create electric authorities).

⁷ See, e.g., § 15.2-823 (2008) (authorizing board of supervisors for urban county with executive form of government to establish commission on human rights); § 15.2-2210 (2008) (mandating that localities create local planning commission); § 15.2-4202 (2008) (defining “commission” as “planning district commission”); § 15.2-4503.1 (2008) (establishing Northern Virginia Transportation Commission); § 15.2-5200 (2008)

(mandating that in each locality or group of localities where governing body[ies] declares need for hospital or health center, hospital or health center commission must be created).

⁸ See 2001 Op. Va. Att’y Gen. 192, 193 (noting that *Code* constitutes single body of law, and legislature is presumed to have intended each enactment to have meaning that is consistent with other provisions of law).

⁹ See § 15.2-4203(B)(1) (providing that “entity organized as a planning district commission under [the Regional Cooperation Act] may employ the name ‘regional council’ or ‘regional commission’ as a substitute for the name ‘planning district commission’”). Thus, the specific terms used in § 15.2-4203(B)(1) implies the absence of authorization to use any other designation. See *infra* note 10.

¹⁰ See, e.g., 2008 Op. Va. Att’y Gen. 126, 127 (noting that when statute creates specific grant of authority, authority is deemed to exist only to extent granted in the statute).

¹¹ See 1996 Op. Va. Att’y Gen. 42, 42 (noting that interpretation is unreasonable if it renders part of list superfluous or meaningless).

¹² See 2008 Op. Va. Att’y Gen. 126, 128 n.5 and opinion cited therein (noting that when General Assembly intends statute to impose requirements, it knows how to express its intention).

OP. NO. 10-093

ADMINISTRATION OF GOVERNMENT: VIRGINIA SMALL BUSINESS FINANCING ACT

The Virginia Small Business Financing Authority is authorized to refinance bonds or other obligations previously issued to another authority or political subdivision, including an industrial development authority.

MR. SCOTT E. PARSONS
EXECUTIVE DIRECTOR
VIRGINIA SMALL BUSINESS FINANCING AUTHORITY
DECEMBER 30, 2010

ISSUE PRESENTED

You ask whether the Virginia Small Business Financing Authority (“VSBFA”) has the legal authority pursuant to the Virginia Small Business Financing Act (“the Act”)¹ to refinance bonds or other obligations previously issued by another authority, public body, or political subdivision including an industrial development authority created under the Industrial Development and Revenue Bond Act.²

RESPONSE

It is my opinion that the VSBFA is authorized to refinance bonds or other obligations previously issued by another authority, public body or political subdivision, including an industrial development authority.

BACKGROUND

You state that over the past 25 years, the VSBFA has issued refunding bonds to refund bonds previously issued by industrial development authorities and other issuers. Each issuance of such refunding bonds by the VSBFA has been duly approved by its Board of Directors following a legal review by the Office of the Attorney General and the opinion of qualified bond counsel. You further state that questions have arisen recently regarding the interpretation of certain provisions of the Act as they relate to the issuance of certain refunding bonds.

APPLICABLE LAW AND DISCUSSION

Section 2.2-2280 establishes the Virginia Small Business Authority. In creating the Authority, the General Assembly identified a broad public purpose:

[T]hat (i) there exists in the Commonwealth a need to assist small business in the Commonwealth in obtaining financing for new business or in the expansion of existing business in order to promote and develop industrial development and to further the long-term economic development of the Commonwealth through the improvement of its tax base and the promotion of employment and (ii) it is necessary to create a governmental body to provide financial assistance to small business in the Commonwealth by providing loans, guarantees, insurance and other assistance to small business, thereby encouraging the investment of private capital in small business in the Commonwealth.^[3]

To fulfill this purpose, the General Assembly granted to the VSBFA “all powers necessary or appropriate to carry out and effectuate its purposes including, but not limited to” an extensive list of enumerated powers that includes the power to “borrow money and issue bonds as provided by” Article 7.⁴

Section 2.2-2287 explicitly authorizes the VSBFA to borrow money and issue bonds to pay the cost of the projects for which the bonds have been issued. Specifically, this statute provides that “[w]hensoever [the VSBFA] deems refunding expedient it may refund *any* bonds by the issuance of new bonds”⁵ Section 2.2-2200 broadly defines the term “bonds” as “*any* bonds, refunding bonds, notes, debentures, interim certificates, or any bond, grant, revenue anticipation notes or any other evidences of indebtedness or obligation of an authority...”⁶ This language evidences a clear legislative intent to grant the VSBFA broad discretion and authority to issue refunding bonds for the benefit of eligible projects in the furtherance of the purposes of the Act.

It is a general rule of statutory construction that the words of a statute are to be given their usual, commonly understood meaning.⁷ Generally, where the language of a statute is clear and unambiguous, rules of statutory construction are not required.⁸

Furthermore, § 2.2-2281 provides:

Nothing contained in this article shall be construed as a restriction or limitation upon any powers that the Authority might otherwise have under any other law of the Commonwealth, and this article supersedes all other laws in conflict herewith and is cumulative to such powers. Insofar as the provisions of this article are inconsistent with the provisions of any other law, the provisions of this article shall be controlling and the powers conferred by this article shall be regarded as supplemental and additional to powers conferred by any other laws. No proceedings, notice or approval shall be required for the issuance of any bonds or any instrument or the security therefor, except as provided in this article.

The provisions of this article shall be liberally construed to accomplish the purposes of this article.^[9]

The plain language of the Act is broad and unequivocal. The General Assembly, when defining the term “bonds” in § 2.2-2200, specifically mentions the word “bond” in three separate contexts. Therefore, the legislature was aware of the broad spectrum of bonds and the various entities that might issue such bonds. If the General Assembly wished to limit the authority of the VSBFA to issue refunding bonds only to refund certain types of previously issued bonds, it could easily have done so by expressly stating such limitations in § 2.2-2287. Similarly, the General Assembly could have expressly provided that the authority of the VSBFA to issue refunding bonds under this section did not apply to bonds issued by local industrial development authorities. Such limitations, however, are not included in the statute, and no such limitation should be implied. The General Assembly uses the language “any bonds” in § 2.2-2287, and, as the Act provides, the broad implications of that term must “be liberally construed to accomplish the purposes of the” Act.¹⁰

Moreover, for the past several years, the VSBFA has issued refunding bonds to refund bonds that were originally issued by industrial development authorities or other issuers. Each issuance was reviewed by bond counsel and the Office of the Attorney General. In most instances, these refunding bonds were issued only after public hearings and approval as required by statute.¹¹ During that time, the General Assembly amended Article 7 several times, the last being in 2009. Additionally, the VSBFA is required to submit an annual fiscal report of its activities to the Governor and to the chairmen of the House Committee on Appropriations and the Senate Committee on Finance.¹² Therefore, the General Assembly had both actual and constructive notice of the practices of the VSBFA, and it has not chosen to amend the Act to prohibit such conduct. This acquiescence further confirms the plain meaning of the statute noted above.¹³

CONCLUSION

Accordingly, it is my opinion that the VSBFA is authorized to refinance bonds or other obligations previously issued by another authority, public body, or political subdivision, including an industrial development authority.

¹ VA. CODE ANN. §§ 2.2-2279 through 2.2-2314 (2008 & Supp. 2010).

² VA. CODE ANN. §§ 15.2-4900 through 15.2-4920 (2008 & Supp. 2010).

³ Section 2.2-2280 (Supp. 2010).

⁴ Section 2.2-2285 (2008).

⁵ Section 2.2-2287 (2008) (emphasis added).

⁶ Section 2.2-2200 (2008) (emphasis added).

⁷ See 1985-86 Op. Va. Att’y Gen. 24, 25. See also *Covington Virginia, Inc. v. Woods*, 182 Va. 538, 548-49, 29 S.E.2d 406, 411 (1944) (“In the construction of statutes, the courts have but one object, to which all rules of construction are subservient, and that is to ascertain the will of the legislature, the true intent and meaning of the statute, which are to be gathered by giving to all the words used their plain meaning, and construing all statutes *in pari materia* in such manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation.”).

⁸ *Id.* (citing *Ambrogio v. Koontz*, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982)).

⁹ Section 2.2-2281 (2008) (emphasis added).

¹⁰ Section 2.2-2281.

¹¹ See § 2.2-2292 (Supp. 2010).

¹² See § 2.2-2312 (2008).

¹³ See *Dep’t of Taxation v. Progressive Cmty. Club*, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975). See also *Miller v. Commonwealth*, 180 Va. 36, 42, 21 S.E.2d 721, 723 (1942) (“The Legislature is presumed to be cognizant of [the construction given to a statute by public officials], and, when long continued, in the absence of legislation evincing a dissent, the courts will adopt that construction.”) (citation omitted); 1986-87 Op. Va. Att’y Gen. 194, 194 (“Board’s regulations ... have been in effect since 1980 and have not been modified by legislative action of the General Assembly, thereby indicating that the General Assembly has acquiesced in them”); 1977-78 Op. Va. Att’y Gen. 77, 78 (“The legislature, when it passes a new law, or amends an old one, is presumed to act with full knowledge of the law as it stands.”).

OP. NO. 09-100

AGRICULTURE, ANIMAL CARE, AND FOOD: COMPREHENSIVE ANIMAL LAWS – AUTHORITY OF LOCAL GOVERNING BODIES

Locality may adopt ordinance that authorizes pound to initiate and enforce policies that place restrictions or requirements upon adoption of animals beyond those required by § 3.2-6546.

THE HONORABLE H. MORGAN GRIFFITH
MEMBER, HOUSE OF DELEGATES
JANUARY 13, 2010

ISSUE PRESENTED

You ask whether a locality may enact an ordinance authorizing a pound to initiate and enforce policies that place restrictions or requirements upon the adoption of animals beyond those required by § 3.2-6546.

RESPONSE

It is my opinion that a locality may adopt an ordinance that authorizes a pound to initiate and enforce policies that place restrictions or requirements upon the adoption of animals beyond those required by § 3.2-6546.

APPLICABLE LAW AND DISCUSSION

Article 6, Chapter 65 of Title 3.2, §§ 3.2-6537 through 3.2-6554, governs the authority of local governing bodies regarding regulation of dogs, certain animals, and pounds. Section 3.2-6546(D) enumerates the ways for disposing of an animal, including adoptions, and provides that:

2. Adoption by a resident of the county or city where the pound is operated and who will pay the required license fee, if any, on such animal, provided that such resident has read and signed a statement specifying that he has never been convicted of animal cruelty, neglect, or abandonment;

3. Adoption by a resident of an adjacent political subdivision of the Commonwealth, if the resident has read and signed a statement specifying that he has never been convicted of animal cruelty, neglect, or abandonment;

4. Adoption by any other person, provided that such person has read and signed a statement specifying that he has never been convicted of animal cruelty, neglect, or abandonment, and provided that no dog or cat may be adopted by any person, who is not a resident of the county or city where the pound is operated, or of an adjacent political subdivision, unless the dog or cat is first sterilized, and the pound may require that the sterilization be done at the expense of the person adopting the dog or cat[.]

When a statute is clear and unambiguous, the rules of statutory construction dictate that the statute is interpreted according to its plain language.¹ In addition, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.² Section 3.2-6546(D) provides that “[s]uch animal may^[3] be euthanized ... or disposed of by the methods set forth in subdivision 1 through 5.” However, § 3.2-6543(A) authorizes a local governing body to adopt a more “stringent” ordinance that parallels § 3.2-6546. The General Assembly has not defined the term “stringent” in this context. In the absence of a statutory definition, the plain and ordinary meaning of a term is controlling.⁴ The term “stringent” means “marked by rigor, strictness, or severity esp. with regard to rule or standard.”⁵

Statutes that pertain to the same subject matter are to be construed as *in pari materia*.⁶ Where possible, the two should be harmonized in order to give effect to both.⁷ “If both the statute and the ordinance can stand together and be given effect, it is the duty of the courts to harmonize them and not nullify the ordinance.”⁸ Consistent with Dillon’s Rule, the local ordinance must be supported by adequate enabling legislation.⁹ An ordinance is inconsistent with state law if state law preempts local regulation in the area, either by

expressly prohibiting local regulation or by enacting state regulations so comprehensive that the state may be considered to occupy the entire field.¹⁰ In this matter, the statutory language is clear that localities are not preempted in the regulation of animal law. The General Assembly authorizes localities to regulate animal law in their jurisdictions by enacting regulations concerning leash laws¹¹ and nuisance and running at large laws.¹² Further, in enacting § 3.2-6543(A), the General Assembly has demonstrated its intent to allow localities to regulate animal law by specifically providing that a locality may adopt more stringent standards than that provided by state law in certain circumstances.

CONCLUSION

Accordingly, it is my opinion that a locality may adopt an ordinance that authorizes a pound to initiate and enforce policies that place restrictions or requirements upon the adoption of animals beyond those required by § 3.2-6546.

¹Va. Polytechnic Inst. & State Univ. v. Interactive Return Serv., Inc., 271 Va. 304, 309, 626 S.E.2d 436, 438 (2006).

²See 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2007) (explaining maxim “*expressio unius est exclusio alterius*”); Op. Va. Att’y Gen.: 2002 at 109, 111; 1992 at 145, 146; 1989 at 252, 253; 1980-1981 at 209, 210.

³“Unless it is manifest that the purpose of the legislature was to use the word ‘may’ in the sense of ‘shall’ or ‘must,’ then ‘may’ should be given its ordinary meaning—permission, importing discretion.” *Masters v. Hart*, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949), *quoted in* Bd. of Supvrs. v. Weems, 194 Va. 10, 15, 72 S.E.2d 378, 381 (1952); *see also* Op. Va. Att’y Gen.: 2000 at 29, 32 n.2; 1999 at 193, 195 n.6; 1997 at 10, 12 (noting that use of “may” in statute indicates statute is permissive and discretionary, rather than mandatory).

⁴*See* Sansom v. Bd. of Supvrs., 257 Va. 589, 594-95, 514 S.E.2d 345, 349 (1999); *Commonwealth v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980).

⁵MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1162 (10th ed. 2001).

⁶*See* Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957); Op. Va. Att’y Gen.: 1983-1984 at 135, 135; 1982-1983 at 343, 344; 1981-1982 at 273, 274.

⁷*Id.*

⁸*King v. County of Arlington*, 195 Va. 1084, 1091, 81 S.E.2d 587, 591 (1954).

⁹*Va. Beach v. Hay*, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999) (holding that, under Dillon’s Rule, local governing bodies have only those powers expressly granted by legislature, “those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable”; where legislature grants power to local government, but does not specify method of implementing power, local government’s choice regarding implementation of conferred power will be upheld, provided method chosen is reasonable).

¹⁰*See* *Lynchburg v. Dominion Theatres, Inc.*, 175 Va. 35, 40, 7 S.E.2d 157, 159 (1940); Op. Va. Att’y Gen.: 2007 at 59, 60; 1983-1984 at 86, 87; *see also* *Hanbury v. Commonwealth*, 203 Va. 182, 185, 122 S.E.2d 911, 913 (1961) (noting that ordinance conflicting with state law of general character and state-wide application is invalid); *cf. King*, 195 Va. at 1089-90, 81 S.E.2d at 591 (noting that state did not occupy enter field; therefore, locality could govern by ordinance).

¹¹*See* VA. CODE ANN. § 3.2-6539 (2008).

¹²*See* § 3.2-6538 (2008).

OP. NO. 10-001

CHARTER OF THE CITY OF NEWPORT NEWS

EDUCATION: GENERAL POWERS AND DUTIES OF SCHOOL BOARD

Charter of City of Newport News does not require that Newport News School Board rely on sole legal advice of City attorney; Board may retain its own counsel.

THE HONORABLE G. GLENN ODER
MEMBER, HOUSE OF DELEGATES
FEBRUARY 2, 2010

ISSUE PRESENTED

You ask whether the Charter of the City of Newport News requires that the Newport News School Board exclusively rely on the legal advice of the attorney for the City or whether the Board may engage alternate legal counsel.

RESPONSE

It is my opinion that the Charter of the City of Newport News does not require that the Newport News School Board rely on the sole legal advice of the attorney for the City, and the Board may retain its own counsel.

APPLICABLE LAW AND DISCUSSION

The Charter of the City of Newport News (the “Charter”) provides that “[t]he city attorney shall ... be the legal advisor of the council ... and all ... boards ... and agencies of the city, including the school board, in all matters affecting the interest of the city and shall upon request furnish a written opinion on any question of law.”¹ Section 22.1-82(A) provides, however, that:

Notwithstanding any other provision of law, the attorney for the Commonwealth or other counsel may be employed by a school board to advise it concerning any legal matter or to represent it, any member thereof or any school official in any legal proceeding to which the school board, member or official may be a party, when such proceeding is instituted by or against it or against the member or official by virtue of his actions in connection with his duties as such member or official.

Thus, there is an apparent conflict between the provisions of the Charter relating to the duties of the City attorney and § 22.1-82(A). Ordinarily, where a charter and a statute conflict, the charter controls.² However, this canon of construction does not apply where the statute clearly indicates that the General Assembly intended it to control conflicts.³ The language in § 22.1-82(A), “[n]otwithstanding any other provision of law,” manifests just such an intent.⁴

Article VIII, § 7 of the Constitution of Virginia provides that “[t]he *supervision of schools in each school division shall be vested in a school board*, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law.” (Emphasis added.) In this analysis, it is important to consider the constitutional requirement that the supervision of schools is vested with the school boards. The ability to retain legal counsel can be important to the school board in fulfilling its mission. Further, the General Assembly, through its chosen language, ensured the flexibility of the school board to retain its own counsel.⁵

CONCLUSION

Accordingly, it is my opinion that the Charter of the City of Newport News does not require that the Newport News School Board rely on the sole legal advice of the attorney for the City, and the Board may retain its own counsel.

¹Section 10.03(A) (1978), available at http://library1.municode.com/default-test/home.htm?infobase=14013&doc_action=whatsnew; see also 1978 Va. Acts ch. 576, at 886, 907-08 (enacting “Charter of City of Newport News,” including § 10.03 of Chapter 10).

²See Op. Va. Att’y Gen.: 1997 at 46, 46; 1995 at 155, 157; 1978-1979 at 35, 35; see also 1976-77 at 42, 44 (noting charter provision generally prevails over statute).

³See Op. Va. Att’y Gen.: 1997, *supra* note 2, at 46; 1995, *supra* note 2, at 157; 1978-79, *supra* note 2, at 36.

⁴See 1978-79 Op. Va. Att’y Gen., *supra* note 2, at 36 (concluding that statutory phrase “[n]otwithstanding any other provision of law” is evidence of legislative intent that statute must be interpreted to prevail over provision in charter); see also *Chambers v. Roanoke*, 114 Va. 766, 768, 78 S.E. 407, 408 (1913) (holding that amendment to specific charter provision is not repealed by reenactment of prior general statute when statute declares that nothing “in conflict with any provision of the charter of any city or town shall be construed to repeal such provision” unless expressly stated). The phrase “[n]otwithstanding any other provision of law” indicates a clear legislative intent to override potential conflicts with all earlier legislation. See Op. Va. Att’y Gen.: 1996 at 197, 198; 1987-1988 at 1, 2; see also 1998 Op. Va. Att’y Gen. 19, 21 (interpreting statute beginning with phrase, “[n]otwithstanding any other provision of this chapter”).

⁵See 1981-82 Op. Va. Att’y Gen. 326, 327 (discussing change to § 22-56.1, predecessor to § 22.1-82, regarding authority of school board to hire counsel).

OP. NO. 10-042

CHARTER OF THE CITY OF SUFFOLK

Devolution of duties pursuant to City Charter transferred Commissioner’s statutory duties relating to real estate assessment to city real estate assessor.

THE HONORABLE THOMAS A. HAZELWOOD
COMMISSIONER OF THE REVENUE, CITY OF SUFFOLK
DECEMBER 17, 2010

ISSUE PRESENTED

You ask whether the devolution of the Commissioner of the Revenue’s duties with respect to the assessment of real estate to a city real estate assessor transfers to the assessor the Commissioner’s responsibility under § 58.1-3984(B) of the *Code of Virginia*.

RESPONSE

It is my opinion that, in the City of Suffolk, the devolution of the Commissioner of the Revenue's duties with respect to the assessment of real estate to a city real estate assessor transfers to the assessor the Commissioner's responsibility under § 58.1-3984(B) to the extent § 58.1-3984(B) applies to assessments of real property.

APPLICABLE LAW AND DISCUSSION

The Charter for the City of Suffolk (the "Charter") generally sets forth the duties of the Commissioner of Revenue.¹ These duties include the assessment² of property for tax purposes.³ The Charter further provides, however, for the delegation to a city real estate assessor the function of assessing real property. Specifically, § 8.06 of the Charter states:

The council may, in lieu of the methods prescribed by general law, provide by ordinance for the annual assessment and reassessment and equalization of assessments of real estate for local taxation and to that end may appoint one or more assessors within the city *and prescribe their duties* and terms of office. Such assessors shall make assessments and reassessments on the same basis as real estate is required to be assessed under the provisions of general law...and shall be charged with duties similar to those thereby imposed upon such assessors^[4]

Pursuant to this Charter provision, the City Council created the office of city real estate assessor.⁵ In creating the office, the City Council specified:

Annual real estate assessments shall be made by a single assessor appointed by the city council for such purpose He shall be known as the city real estate assessor, and he shall have all the powers and duties prescribed by laws of the state for assessors of real estate; *and all the duties now or formerly devolved upon the commissioner of the revenue of the city with respect to the assessment of real estate for taxation are transferred to and devolve upon the city real estate assessor.*^[6]

Section 58.1-3984(B) of the *Code of Virginia* provides that, under certain circumstances, the Commissioner of the Revenue of a locality shall apply to the appropriate court for the correction of an erroneous assessment.⁷ You ask whether the assignment of the Commissioner of the Revenue's duties to the city assessor encompasses the responsibilities under § 58.1-3984(B).

"When the language of a statute is unambiguous, we are bound by the plain meaning of that language and may not assign the words a construction that amounts to holding that the General Assembly did not mean what it actually stated."⁸ Similarly, when an ordinance is unambiguous, its plain meaning is controlling.⁹ To the extent, therefore, that the relevant provisions of the Charter and the City Code are clear, they must be given their plain meaning.

In enacting the Charter, the General Assembly used broad language in the provision authorizing the transfer of assessment duties to the assessor. It provided that the City

Council may appoint assessors for the valuation of real estate “and prescribe their duties. . . .”¹⁰ When establishing the assessor’s office, the City Council also used broad language with regard to the duties of the assessor. The ordinance creating the office provides that “*all* the duties now or formerly devolved upon the commissioner of the revenue of the city with respect to the assessment of real estate . . . are transferred to and devolve upon the city real estate assessor.”¹¹ Based on the plain meaning of the clear language of the Charter and the ordinance creating the assessor’s office, the duties in § 58.1-3984(B), to the extent they apply to the assessment of real property, have been assigned to the assessor.¹²

This interpretation is consistent with a prior opinion of this Office. A 1977 Opinion addressed whether the Commissioner of the Revenue for the City of Norfolk had “any responsibility in the assessment of real estate or any responsibility in the case of incorrect assessments.”¹³ Norfolk had appointed an assessor pursuant to Chapter 29 of the Acts of Assembly of 1947.¹⁴ The 1977 Opinion concluded that, in Norfolk’s situation, the Commissioner of the Revenue had no responsibility with regard to the valuation of real estate or the correction of inaccurate assessments.¹⁵

CONCLUSION

Accordingly, it is my opinion that, in the City of Suffolk, the devolution of the Commissioner of the Revenue’s duties with respect to the assessment of real estate to a city real estate assessor transfers to the assessor the Commissioner’s responsibility under § 58.1-3984(B) to the extent § 58.1-3984(B) applies to assessments of real property.

¹See CHARTER FOR THE CITY OF SUFFOLK, VA. § 8.05, *available at* http://library1.municode.com/default-test/home.htm?infobase=11612&doc_action=whatsnew.

²“As used in the various statutes relating to the taxation of real property in Virginia the word ‘assessment’ has a dual meaning, referring either to the valuation of property for tax purposes or to the levy of taxes on the basis of previously determined property values.” 1977-78 Op. Va. Att’y Gen. 71, 71 (citing *Hoffman v. Augusta County*, 206 Va. 799, 146 S.E.2d 249 (1966); *see also* *St. Andrew’s Ass’n v. City of Richmond*, 203 Va. 630, 633-34, 125 S.E.2d 864, 866-67 (1962). As used in this opinion, the term “assessment” means the determination of property value for tax purposes.

³Charter § 8.05 provides: “The commissioner of revenue shall perform all duties required by statute and perform such duties not inconsistent with the laws of the Commonwealth in relation to the assessment of property and licenses as may be assigned by the director of finance or the council.”

⁴CHARTER FOR THE CITY OF SUFFOLK, VA. § 8.06 (emphasis added).

⁵See CITY OF SUFFOLK, VA., CODE §§ 82-426; 82-427 (1998) (creating office of assessor), *available at* http://library1.municode.com/default-test/home.htm?infobase=11612&doc_action=whatsnew.

⁶*Id.* § 82-427 (emphasis added).

⁷See VA. CODE ANN. § 58.1-3984(B) (2009).

⁸*Commonwealth v. Diaz*, 266 Va. 260, 264-65, 585 S.E.2d 552, 554 (2003) (citing *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003); *Mozley v. Prestwoud Bd. of Dirs.*, 264 Va. 549, 554, 570 S.E.2d 817, 820 (2002)).

⁹*Hanover County v. Bertozzi*, 256 Va. 350, 354, 504 S.E.2d 618, 620 (1998) (citing *Bd. of Supvrs. of Fauquier County v. Machnick*, 242 Va. 452, 456, 410 S.E.2d 607, 609 (1991)).

¹⁰CHARTER FOR THE CITY OF SUFFOLK, VA. § 8.06.

¹¹CITY OF SUFFOLK, VA., CODE § 82-427 (emphasis added).

¹² The Commissioner of the Revenue may continue to have obligations under § 58.1-3984(B). For example, the duty to petition for corrections of personal property assessments under § 58.1-3984(B) may remain with the Commissioner of the Revenue. See 2004 Op. Va. Att’y Gen. 218, 222 (finding that the Commissioner of the Revenue for the City of Hampton has a duty to initiate a judicial correction pursuant to § 58.1-3984(B) when he determines an assessment for tangible personal property taxes is improper or in obvious error).

¹³ 1977-78 Va. Op. Att’y Gen. 71 (citing requester’s letter of inquiry).

¹⁴ *Id.* (Chapter 29 of the Acts of Assembly of 1947 was continued in effect by § 58.1-3260(2) (2009)).

¹⁵ *Id.* But see 1998 Va. Op. Att’y Gen. 128 (recognizing that the valuation of real estate for taxes “ordinarily is performed by the local board of assessors or a local real estate appraiser rather than by the commissioner of the revenue” and concluding that in certain circumstances the commissioner of the revenue has a mandatory duty to file under § 58.1-3984(B)). The 1998 Opinion is distinguishable from this situation as it did not address the question presented here, and it did not examine the relevant ordinances or enabling legislation.

OP. NO. 10-083

CIVIL REMEDIES AND PROCEDURE: JUDGMENTS AND DECREES GENERALLY – KEEPING OF DOCKET BOOKS

Clerk is required to accept a certified copy of a final judgment order issued by U.S. Bankruptcy Court when the copy provides the information required by § 8.01-449.

THE HONORABLE TERRY H. WHITTLE
CLERK OF COURT, WINCHESTER CIRCUIT COURT
SEPTEMBER 17, 2010

ISSUE PRESENTED

You ask whether the docketing procedure provided by § 8.01-446, which requires the deliverance of “an authenticated legible abstract” of judgment, allows a circuit court clerk to refuse to docket a certified copy of a final judgment order issued by a U.S. Bankruptcy Court when such a document is presented to the clerk’s office.

RESPONSE

It is my opinion that § 8.01-446 requires the clerk of court to accept such a certified copy, provided the copy otherwise provides the information required by § 8.01-449.

APPLICABLE LAW AND DISCUSSION

Article VII, § 4 of the Constitution of Virginia establishes the office of “a clerk, who shall be clerk of the court in the office of which deeds are recorded” and mandates that the duties of the office “shall be prescribed by general law or special act.” As a general rule, circuit court clerks have no inherent powers, and the scope of their powers must be determined by reference to applicable statutes.¹ There are several hundred specific statutes that prescribe the duties of the clerk, which include the recording of deeds, orders, financing statements and other instruments.² The manner in which these duties are performed are a function of management, tradition, custom and local practice.³ Considerable deference is given to decisions made by clerks and, “in the absence of a constitutional or statutory provision to the contrary, constitutional officers have exclusive

control over the operation of their offices.”⁴ The clerk, as a constitutional officer, “is free to discharge his prescribed powers and duties in the manner in which he deems appropriate” unless limited by law.⁵ If a statute specifically directs the manner in which a clerk performs a duty, the clerk must comply with the statute.

Section 8.01-446 provides, in pertinent part, that “[t]he clerk of each court of every circuit shall ... docket, without delay, any judgment for a specific amount of money rendered in this Commonwealth by any other court of this Commonwealth or federal court, when he shall be required to do so by any person interested, on such person delivering to him an authenticated legible abstract of it[.]” Section 8.01-477 provides further that “judgments and decrees rendered in the circuit court of appeals or a district court of the United States within this Commonwealth may be docketed and indexed ... in the same manner and under the same rules and requirements of law as judgments and decrees of courts in this Commonwealth.”

The Code does not define “abstract of judgment.” I therefore accord the term its plain meaning. *Black’s Law Dictionary* defines it simply as a “copy or summary of a judgment that, when filed with the appropriate public office, creates a lien on the debtor’s nonexempt property.”⁶ Similarly, an “abstract” is defined as a “statement summarizing the important points of a text,”⁷ or a “concise statement of a text, esp. of a legal document; a summary.”⁸ As such, entitling a document a “certified copy” rather than an “abstract of judgment” does not render it insufficient for docketing pursuant to § 8.01-446.

The Code, however, does require that the document delivered for docketing contain certain information.⁹ Pursuant to § 8.01-449(B), the following, where applicable, is necessary for the clerk to record the judgment: 1) the court and case number in which the judgment was entered; 2) the date and amount of the judgment; 3) the time from which the judgment bears interest; 4) any costs; 5) the names of all the parties as well as the addresses, dates of birth and last four social security number digits of all parties against whom judgment has been entered; 6) the alternative value of any specific property recovered by it; and 7) the amount and date of any credits applied to the judgment.¹⁰ Thus, provided the certified copy of judgment from the bankruptcy court contains the required information, it qualifies as an abstract of judgment under the *Code of Virginia*.

I note further that, although the Code does grant clerks of court the explicit authority to reject presented documents and to refuse to record them, that authority is limited to instances where either the clerk finds the “abstract” to be illegible or the judgment does not comply with the provisions of § 8.01-449.¹¹ Otherwise, the Code provides that the clerk of court “shall docket, without delay”¹² conforming documents so that the clerk has an affirmative duty to docket an authenticated judgment when presented by an interested person.¹³

CONCLUSION

Accordingly, it is my opinion that, so long as the information required by § 8.01-449 is contained in the certified copy of judgment from the bankruptcy court, that certified copy

constitutes an authenticated “abstract of judgment” for purposes of § 8.01-446, so that the clerk of court is required to docket it according to standard procedures.

¹ See 2003 Op. Va. Att’y Gen. 60, 61.

² See “Circuit Court Clerk’s Duties List” of the Office of the Executive Secretary of the Supreme Court of Virginia, <http://www.courts.state.va.us/courts/circuit/resources/cccdl.pdf>.

³ See 2002 Op. Va. Att’y Gen. 62, 62; 2006 Op. Va. Att’y Gen. 99, 100.

⁴ See 2009 Op. Va. Att’y Gen. 56, 57.

⁵ See 1984-85 Op. Va. Att’y Gen. 284, 284.

⁶ BLACK’S LAW DICTIONARY 9 (7th ed. 1999) (emphasis added).

⁷ THE AMERICAN HERITAGE COLLEGE DICTIONARY 6 (3rd ed. 1997).

⁸ BLACK’S LAW DICTIONARY at 9. See also VA. CODE ANN. § 55-108 (2007) (providing “all writings which are to be recorded or docketed in the clerk’s office . . . shall be an original or first generation for, or legible copy thereof”).

⁹ See, e.g., VA. CODE ANN. § 16.1-96 (2010) and 1981-82 Op. Va. Att’y Gen. 63 (both referring to § 8.01-449 to determine the contents of an abstract of judgment).

¹⁰ VA. CODE ANN. § 8.01-466 similarly requires that money judgments state the specific amount owed, the date from which the judgment bears interest, the names of the parties and the address of the judgment debtor.

¹¹ Sections 8.01-446 (Supp. 2010); 8.01-449(E) (Supp. 2010).

¹² Section 8.01-466. The “[u]se of the word ‘shall’ in a statute generally indicates that its procedures are intended to be mandatory, rather than permissive or directive.” 1985-86 Op. Va. Att’y Gen. 119, 120 (citations omitted).

¹³ See 1972-73 Op. Va. Att’y Gen. 74.

OP. NO. 10-011

CIVIL REMEDIES AND PROCEDURE: JUDGMENTS AND DECREES GENERALLY – KEEPING OF DOCKET BOOKS

DOMESTIC RELATIONS: UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT

Docketing of foreign judgment that does not specify a specific amount of money may be docketed either in the judgment docket or in the order book at the clerk’s discretion.

THE HONORABLE JOHN T. FREY
CLERK, FAIRFAX COUNTY CIRCUIT COURT
JULY 8, 2010

ISSUE PRESENTED

You ask whether a foreign judgment for spousal support and maintenance tendered for recording, which does not contain a specific monetary amount, should be docketed in the judgment docket (judgment lien book) or if it can be entered of record in the clerk’s order book.

RESPONSE

It is my opinion that because the judgment does not detail a specific monetary award, it may be entered either in the judgment docket or in the order book, or in any other record deemed suitable, in accord with local practice and the sound discretion of the clerk.

BACKGROUND

You relate that a Maryland court order provides that the former wife is entitled to a portion of the former husband's pension plan. The order does not provide a specific judgment amount, nor does it state that the former husband is in arrears. You note that the attorney for the former wife has presented the order to your Office so that it might be docketed in the judgment lien book.

APPLICABLE LAW AND DISCUSSION

Article VII, § 4 of the Constitution of Virginia establishes the office of "a clerk, who shall be clerk of the court in the office of which deeds are recorded" and mandates that the duties of the office "shall be prescribed by general law or special act." As a general rule, circuit court clerks have no inherent powers, and the scope of powers must be determined by reference to applicable statutes.¹ There are several hundred specific statutes that prescribe the duties of the clerk, which include the recording of deeds, orders, financing statements and other instruments.² This requires the clerk to effectively address changing and competing demands for personnel and resources. The manner in which these duties are performed are a function of management, tradition, custom and local practice.³

Considerable deference is given to decisions made by clerks and, "in the absence of a constitutional or statutory provision to the contrary, constitutional officers have exclusive control over the operation of their offices."⁴ The clerk, as a constitutional officer, "is free to discharge his prescribed powers and duties in the manner in which he deems appropriate" unless limited by law.⁵ Nor can clerks be compelled to perform duties that are not required by statute, but may assume additional responsibilities at their discretion.⁶

A 1995 opinion of the Attorney General concluded the Uniform Enforcement of Foreign Judgments Act ("the Act") is not solely limited to monetary judgments and noted that the Act "authorizes circuit court clerks to accept properly authenticated copies of nonmonetary foreign judgments, in addition to monetary decrees or awards."⁷ The clerk "shall treat the foreign judgment in the same manner" and such judgment "has the same effect and is subject to the same procedures, defenses and proceedings" as if rendered by a circuit court of this Commonwealth.⁸

The clerk is required by statute to keep a "judgment docket" in book or other form, popularly known as a judgment lien book, "in which he shall docket, without delay, any judgment for a specific amount of money."⁹ Entry in the judgment docket constitutes a lien against real property.¹⁰ A properly authenticated and legible foreign or domestic money judgment must be recorded in the judgment docket. Likewise, a decree for support and maintenance "payable in future installments or a monetary award for future

installments as provided for in § 20-107.3,” shall be entered in the judgment docket if “so ordered by the court in such decree.”¹¹

In this instance, you relate that the subject Maryland court order provides that a former wife is entitled to a portion of the former husband’s pension plan without referencing a specific amount. Entry in the judgment docket is not required because the judgment does not mention a specific amount of money. If a statute specifically directs the manner in which a clerk performs a duty, the clerk must comply with the statute. Where, as here, the statute is silent or ambiguous as to how a clerk is to comply with a duty, how the duty is discharged lies within the sound discretion of the clerk. Therefore, where such an order is made a matter of record lies within the sound discretion of the clerk.

CONCLUSION

Accordingly, it is my opinion that because the judgment does not detail a specific monetary award, it may be entered either in the judgment docket or in the order book, or in any other record deemed suitable, in accord with local practice and the sound discretion of the clerk.

¹ See 2003 Op. Va. Att’y Gen. 60, 61.

² See “Circuit Court Clerk’s Duties List” of the Office of the Executive Secretary of the Supreme Court of Virginia, <http://www.courts.state.va.us/courts/circuit/resources/cccdl.pdf>.

³ See 2002 Op. Va. Att’y Gen. 62, 62; 2006 Op. Va. Att’y Gen. 99, 100.

⁴ See 2009 Op. Va. Att’y Gen. 56, 57.

⁵ See 1984-85 Op. Va. Att’y Gen. 284, 284.

⁶ See 2003 Op. Va. Att’y Gen. 60; 2005 Op. Va. Att’y Gen. 78; 2009 Op. Va. Att’y Gen. 60.

⁷ See 1995 Op. Va. Att’y Gen. 26, 27.

⁸ See VA. CODE ANN. § 8.01-465.2 (2007) and 1987-88 Op. Va. Att’y Gen. 83.

⁹ See § 8.01-446 (Supp. 2009).

¹⁰ See § 8.01-458 (2007).

¹¹ See § 8.01-460 (2007).

OP. NO. 10-039

COMMONWEALTH PUBLIC SAFETY: LINE OF DUTY ACT

Firefighters who are employees of the Commonwealth are not covered under the Line of Duty Act unless that are members of a department or rescue squad that has been recognized by a locality as an integral part of the official safety program of the locality.

THE HONORABLE FRANK M. RUFF, JR.
MEMBER, SENATE OF VIRGINIA
AUGUST 10, 2010

ISSUE PRESENTED

You ask whether firefighters who are employees of the Commonwealth qualify for “line of duty” coverage pursuant to the *Code of Virginia*.

RESPONSE

It is my opinion that firefighters who are employees of the Commonwealth are not covered under the Line of Duty Act, § 9.1-400 *et seq.*, unless they are members of a fire company or department or rescue squad that has been recognized by an ordinance or a resolution of the governing body of a Virginia county, city, or town as an integral part of the official safety program of such county, city, or town.

APPLICABLE LAW AND DISCUSSION

The Line of Duty Act (“Act”) provides certain benefits to eligible law enforcement and other public safety personnel who are injured or killed in the line of duty.¹ The list of persons accorded benefits under the Act is specifically defined. Code § 9.1-400(B) provides unambiguously that to be covered under the Act, a firefighter must be a member of a fire company or department or a rescue squad that has been recognized by an ordinance or a resolution of the governing body of a county, city, or town as an integral part of the official safety program of such county, city, or town. Section 9.1-400 reads in part:

“Deceased person” means any individual whose death occurs on or after April 8, 1972, as the direct or proximate result of the performance of his duty ... as a ... *member of any fire company or department or rescue squad that has been recognized by an ordinance or a resolution of the governing body of any county, city or town of the Commonwealth as an integral part of the official safety program of such county, city or town...* [Emphasis added.]

Under generally accepted principles of statutory construction, the mention of one thing in a statute implies the exclusion of another.² Section 9.1-400 does not mention firefighters employed by the Commonwealth in the list of those eligible for benefits under the Act. Rather, the statute only mentions members of a fire company or department or rescue squad properly recognized by a governing body of a county, city, or town as being an integral part of its official safety program. Therefore, the exclusion of firefighters employed by the Commonwealth is presumed to be intentional.³

CONCLUSION

Accordingly, it is my opinion that firefighters employed by the Commonwealth are not covered by the Line of Duty Act unless they are members of a fire company or department or rescue squad that has been recognized by an ordinance or a resolution of the governing body of a county, city, or town as an integral part of the official safety program of such county, city, or town.

¹ See VA. CODE ANN §§ 9.1-400 through 9.1-408 (2006 & Supp. 2010).

² See *Smith Mountain Lake Yacht Club v. Ramaker*, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001). See also Norman J. Singer and J.D. Shamble Singer, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (7th ed. 2007); 17 MICHIE'S JURISPRUDENCE, Statutes § 45 (2006).

³ The maxim of statutory construction *expressio unius est exclusio alterius* is applicable here. Where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute. See, e.g., *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992).

OP. NO. 10-074

CONSERVATION: DEPARTMENT OF CONSERVATION AND RECREATION – PARKS AND RECREATION

The Department may regulate swimming in public parks and other areas over which it exercises supervisory authority, but not any waters in areas not managed by the Department.

THE HONORABLE ALBERT C. POLLARD, JR.

MEMBER, HOUSE OF DELEGATES

AUGUST 23, 2010

ISSUE PRESENTED

You inquire whether the Department of Conservation and Recreation has the authority to establish a “no swim” policy in waters that are adjacent to Virginia parks.

RESPONSE

It is my opinion that the Department may regulate swimming in public parks, natural preserves, and other areas over which the Department exercises supervisory authority, but lacks the authority to regulate swimming in other waters.

BACKGROUND

You relate that the Department of Conservation and Recreation (“the Department”) has adopted a policy governing waters adjacent to certain Virginia parks. You state that the Department prohibits swimming in waters it does not own and allows only state park visitors to wade into public waters that are adjacent to certain Virginia parks.

APPLICABLE LAW AND DISCUSSION

The Department is a creature of statute, and its powers derive from statute.¹ The power of an agency of state government “is not strictly limited, however, to the narrow confines of the express language of the statute. “[E]very power expressly granted, or fairly implied from the language used, or which is necessary to enable [the Agency] to exercise the powers expressly granted, should and must be accorded.”²

The General Assembly has authorized the Department to take title to “state parks, state recreational areas, state trails, greenways, natural areas and natural area preserves.”³ Section 10.1-212 charges the Department with the responsibility of managing, developing and using “any lands purchased, leased or otherwise acquired” by the Department. The Department also has the responsibility of facilitating public use of parks and recreational areas.⁴

To carry out these responsibilities, the Department is empowered “to prescribe rules and regulations necessary or incidental to the performance of duties or execution of powers conferred by law,” to perform “acts necessary or convenient to carry out the duties conferred by law” and, finally, under the Administrative Process Act, to “promulgate regulations necessary to carry out the purposes and provisions of this subtitle.”⁵

Pursuant to this statutory authority, the Department has promulgated a regulation governing swimming in state parks.⁶ It provides that “[n]o person shall bathe, wade or swim in any waters *in any park* except at such times, and in such places as the department may designate as bathing areas, and unless so covered with a bathing suit as to prevent any indecent exposure of the person.”⁷ The Department also has published “management guidelines” for natural area preserves.⁸ Those guidelines provide that

[s]wimming is not an authorized activity on DCR-owned natural area preserves, due primarily to the issue of public safety. With no lifeguards or patrols in place on public beaches or waterways, responsible landowning public agencies cannot officially sanction swimming. Rather, in nearly all cases, they must prohibit or actively discourage it. On privately-owned natural area preserve, decisions to allow swimming or to prohibit it are the responsibility of the landowner.^[9]

The Department has been provided broad authority to regulate the areas, including parks and natural area preserves, that fall within the purview of the Department. The Department can restrict who enters land managed by the Department and what they do once they are on the Department’s land. That Department’s authority includes the power to promulgate and enforce restrictions on swimming or wading on land for which the Department is responsible.¹⁰ There is no authority, however, that would permit the Department to regulate swimming in areas that are not managed by the Department. In the absence of such authority, the Department cannot regulate swimming in such areas.

Whether it is wise or not for the Department to strictly regulate swimming does not render such regulations legally suspect. In considering the exercise of an agency’s regulatory power, “the courts are not concerned with the wisdom or unwisdom of the act done. The only concern of the court is the reasonableness of the regulation promulgated. To hold otherwise would be to substitute judicial opinion for the legislative will.”¹¹ When a policy or regulation does not infringe upon a suspect class or a fundamental right, the standard of review is highly deferential.¹² The courts must defer “if there is any reasonably conceivable set of facts that could provide a rational basis for the” measure under review.¹³ Under this standard, the Department rationally could conclude that the absence of lifeguards exposes the public to danger and would justify a prohibition on swimming that is limited to the land for which the Department is responsible. In other words, that policy may or may not be wise, but it does not lack a legal foundation.

CONCLUSION

Accordingly, it is my opinion that the Department may regulate swimming in public parks, natural preserves, and other areas over which the Department exercises supervisory authority, but lacks the authority to regulate swimming in other waters.

¹ *Muse v. Virginia Alcohol Bev. Control Bd.*, 9 Va. App. 74, 78, 384 S.E.2d 110, 112 (1989).

² *Id.* (quoting *Portsmouth v. Virginia Ry. & Power Co.*, 141 Va. 54, 61, 126 S.E. 362, 364 (1925)).

³ VA. CODE ANN. § 10.1-107 (Supp. 2010).

⁴ Section 10.1-200 (2006).

⁵ Sections 10.1-104(4), (5) and (6) (Supp. 2010).

⁶ 4 VA. ADMIN. CODE § 5-30-170.

⁷ *Id.* (emphasis added).

⁸ Department of Conservation and Recreation, Natural Area Preserve Management Guidelines (Dec. 2000).

⁹ *Id.* at 4.

¹⁰ The land for which the Department is responsible may include land that is submerged in part. *See* VA. CODE ANN. § 28.2-1202(A) (2009) (“Subject to the provisions of § 28.2-1200, the limits or bounds of the tracts of land lying on the bays, rivers, creeks and shores within the jurisdiction of the Commonwealth, and the rights and privileges of the owners of such lands, shall extend to the mean low-water mark but no farther, except where a creek or river, or some part thereof, is comprised within the limits of a lawful survey.”). *See also* § 28.2-1200 (2009) (“All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact according to law, shall remain the property of the Commonwealth and may be used as a common by all the people of the Commonwealth for the purpose of fishing, fowling, hunting, and taking and catching oysters and other shellfish. ...”).

¹¹ *Flory v. Smith*, 145 Va. 164, 168, 134 S.E. 360, 362 (1926).

¹² *Advanced Towing Co. v. Fairfax Cty. Bd. of Supervisors*, 280 Va. 187, 191, 694 S.E.2d 621, 623 (2010).

¹³ *Id.* at 192, 694 S.E.2d at 624.

OP. NO. 10-091

CONSERVATION: DEPARTMENT OF ENVIRONMENTAL QUALITY – SMALL RENEWABLE ENERGY PROJECTS

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING

A locality’s land use ordinances do not extend to state-owned submerged lands; the Department of Environmental Quality is authorized to issue a permit upon determining all other requirements are met.

MR. DAVID K. PAYLOR
DIRECTOR, VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY
DECEMBER 30, 2010

ISSUES PRESENTED

You ask what would constitute compliance with the following statutory provision when a proposed wind project will be located in state waters or on state-owned submerged lands:

The conditions for issuance of the permit by rule for small renewable energy projects shall include: ... [a] certification by the governing body of the locality or localities wherein the small renewable energy project will be located that the project complies with all applicable land use ordinances.^[1]

You also inquire which entity or entities, if any, have jurisdiction to provide the Department of Environmental Quality (DEQ) with this statutorily-required certification in such circumstances.

In addition, you pose three sub-questions:

- a) Do local governments have land use jurisdiction over renewable energy projects located in state waters or on state-owned submerged lands? If so, how would the boundaries of such jurisdiction be identified so as to assure that the correct local government was providing the “local government certification” for a particular project?
- b) If such authority does not rest with local governments, is there another entity (or entities) with land use jurisdiction over renewable energy projects located in state waters or on state-owned submerged lands that may be identified to provide “certification” that such project will comply with “all applicable land use ordinances”?
- c) If no entity currently has authority to provide DEQ with the required certification, how should DEQ address this statutory requirement in the proposed regulations for wind energy, in light of the fact that the General Assembly has directed that the regulations must be effective no later than January 1, 2011?²

RESPONSE

It is my opinion that Virginia localities do not have the authority to extend the application of their land use ordinances to state-owned submerged lands; and that therefore, for small renewable energy projects located on or in the waters above state-owned bottomland, there are no “applicable land use ordinances” for purposes of the certification requirement of § 10.1-1197.6(B)(2). Because DEQ is directed to assess whether a submitted application meets the requirements of “the applicable permit by rule regulations,” it is further my opinion that DEQ may treat the certification requirement of § 10.1-1197.6(B)(2) as inapplicable in this circumstance and may authorize a project if the agency determines that the project applicant has met all other applicable requirements.

BACKGROUND

You note that, in 2009, the General Assembly adopted legislation establishing a “Permit by Rule” process for “the construction and operation of small renewable energy projects, including such conditions and standards necessary to protect the Commonwealth’s natural resources.”³ The enacted “Small Renewable Energy Projects” legislation⁴ authorizes DEQ to develop one or more permits by rule for renewable energy projects with a rated

capacity of 100 megawatts and less. DEQ is to promulgate regulations concerning such permits by rule to be effective as soon as practicable but no later than January 1, 2011.⁵

The 2009 permit by rule statutes require an applicant seeking permit by rule authorization for a project to submit to DEQ fourteen specific application components. The application must include a “certification by the governing body of the locality or localities wherein the small renewable energy project will be located that the project complies with all applicable land use ordinances.”⁶ You explain that DEQ formed a Regulatory Advisory Panel (Panel) in 2009 to assist the agency in developing draft permit by rule regulations, and that the Panel recommended that this statutory requirement appear verbatim in the proposed regulations.⁷

You observe, however, that DEQ and the Panel developed the draft regulations primarily with land-based wind projects in mind, and that during Panel discussions of the issue, local government certification was described as part of the “siting” phase of a project’s development. You note that the siting decision is a necessary prerequisite for DEQ to regulate the “construction and operation” phases of a project, as mandated by the 2009 PBR statutes.⁸

You explain that DEQ also established an Offshore/Coastal Wind Regulatory Advisory Panel (Offshore Panel) that began meeting in June 2010 to develop possible amendments to the original proposed permit by rule regulations and to address resource-protection issues related to wind projects in coastal land areas and in state waters. You describe that one issue the Offshore Panel faced was identifying the entity or entities that would provide the statutorily-required “local government certification” when the wind project is located in state waters or on state-owned submerged lands. You further convey that the Offshore Panel ultimately recommended that the language requiring local government certification remain unchanged until this question can be resolved.

APPLICABLE LAW AND DISCUSSION

I. Ownership and Regulation of Uses of Submerged Lands by the Commonwealth

Federal law establishes that “[t]he seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line.”⁹ Within this three-mile boundary, the Commonwealth owns the submerged lands under the water up to the mean low water mark.¹⁰ Although localities in the Commonwealth may establish territorial boundaries that extend over waters of the Commonwealth, the Commonwealth retains ownership of the submerged lands under those waters.¹¹

Section 28.2-1203(A) restricts the enjoyment of state-owned submerged lands to the uses it explicitly enumerates and to those authorized by Virginia Marine Resources Commission (VMRC).¹² Pursuant to § 28.2-1204, the VMRC is authorized to issue permits for all reasonable uses of state-owned submerged lands, “including but not limited to, dredging, the taking and use of material, and the placement of wharves, bulkheads, and fill by owners of riparian land in the waters opposite their lands, provided such wharves, bulkheads, and fill do not extend beyond any lawfully established bulkhead lines....” With the approval of the Attorney General and the Governor, the

VMRC also is authorized to “grant easements over or under or lease the beds of the waters of the Commonwealth outside of the Baylor Survey.”¹³ Although VMRC has been granted this authority, it is an agency of the Commonwealth. It is not the governing body of a locality, the entity responsible for providing the certification described in § 10.1-1197.6(B)(2). Therefore, the VMRC cannot fulfill this statutory requirement.¹⁴

II. Local Regulation of State-Owned Lands

Your questions raise the issue of whether a local government has land use jurisdiction over projects and facilities in state waters or on state-owned submerged lands, even though the Commonwealth owns the underlying bottomland. In general, Virginia follows the Dillon Rule of strict statutory construction, which provides that “municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable”¹⁵ and its corollary that “[t]he powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication.”¹⁶ Therefore, to have the power to act in a certain area, local governments must have express enabling legislation or authority that is necessarily implied from enabling legislation.¹⁷

The General Assembly has not granted specific authority to localities to extend their land use regulations to projects located on state-owned bottomlands or the waters above them. Section 15.2-2280 does provide a locality with the authority to zone the territory under its jurisdiction,¹⁸ but absent a situation where the Commonwealth has conveyed ownership or control of specific areas of bottomland,¹⁹ submerged lands beyond the mean low water mark belong to the Commonwealth and thus are not within any locality’s jurisdiction.²⁰ In light of this conclusion, DEQ need not amend the proposed regulations for wind energy to address this situation further.

CONCLUSION

Accordingly, it is my opinion that Virginia localities do not have the authority to extend the application of their land use ordinances to state-owned submerged lands; and that therefore, for small renewable energy projects located on or in the waters above state-owned bottomland, there are no “applicable land use ordinances” for purposes of the certification requirement of § 10.1-1197.6(B)(2). Because DEQ is directed to assess whether a submitted application meets the requirements of “the applicable permit by rule regulations,” it is further my opinion that DEQ may treat the certification requirement of § 10.1-1197.6(B)(2) as inapplicable in this circumstance and may authorize a project if the agency determines that the project applicant has met all other applicable requirements.

¹ VA. CODE ANN. § 10.1-1197.6(B)(2) (Supp. 2010).

² Section 10.1-1197.6(A).

³ See 2009 Va. Acts chs. 808, 854; § 10.1-1197.6(A). A “permit by rule” is an expedited form of project permitting: a regulation sets forth the requirements that an applicant must meet, and if the applicant satisfies those requirements, the permitting agency authorizes the project according to the permit by rule regulations.

⁴ These statutes are codified, in relevant part, at §§ 10.1-1197.5 through 10.1-1197.11.

⁵ *Id.*

⁶ Section 10.1-1197.6(B)(2).

⁷ See 9 VA. ADMIN. CODE § 15-40-30(A)(2) (2010).

⁸ Section 10.1-1197.6(A).

⁹ 43 U.S.C. § 1312 (2006) (part of the Submerged Lands Management Act, 43 U.S.C. §§ 1301 through 1315).

¹⁰ See VA. CODE ANN. § 1-302 (2008), which provides, in part, that: “A. The jurisdiction of the Commonwealth shall extend to and over, and be exercisable with respect to, waters offshore from the coasts of the Commonwealth as follows:

1. The marginal sea and the high seas to the extent claimed in the Virginia Constitution of 1776 and not thereafter ceded by action of the General Assembly.

2. All submerged lands, including the subsurface thereof, lying under the waters listed in subdivision 1 of this subsection.

B. The ownership of the waters and submerged lands enumerated or described in subsection A of this section shall be in the Commonwealth unless it shall be, with respect to any given parcel or area, in any other person or entity by virtue of a valid and effective instrument of conveyance or by operation of law.” See also VA. CODE ANN. § 28.2-1200 (2009): “All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact according to law, shall remain the property of the Commonwealth and may be used as a common by all the people of the Commonwealth for the purpose of fishing, fowling, hunting, and taking and catching oysters and other shellfish.” See also § 28.2-1202(A) (2009): “Subject to the provisions of § 28.2-1200, the limits or bounds of the tracts of land lying on the bays, rivers, creeks and shores within the jurisdiction of the Commonwealth, and the rights and privileges of the owners of such lands, shall extend to the mean low-water mark but no farther, except where a creek or river, or some part thereof, is comprised within the limits of a lawful survey.” Please note that there are instances when courts have found that riparian land owners possessed property rights in subaqueous lands that were conveyed by specific deed language, usually created during the Commonwealth’s colonial period, and often granted by a royal decree (known as “king’s grant” property rights). This Opinion does not address these rare situations.

¹¹ VA. CODE ANN. § 2.2-408 (2008) charges the Secretary of the Commonwealth with responsibility for collecting from governmental subdivisions of the Commonwealth information relevant to their boundary changes, and disseminating such information to state government departments. Pursuant to VA. CODE ANN. § 15.2-207 (2008), the charter of any municipal corporation shall not contain the metes and bounds of the municipal corporation, but the boundaries shall be incorporated therein by reference to the recordation of the final decree or order of the court establishing such boundaries or the act of the General Assembly by which they are defined. See also § 15.2-3108 (2008), which establishes the procedure for localities to petition the circuit court to change a common boundary line, including a requirement that the Clerk send a court order setting forth the new boundary line to the Secretary of the Commonwealth.

See also § 15.2-3105 (2008), which states that the boundary of every locality bordering on the Chesapeake Bay, including its tidal tributaries, or the Atlantic Ocean “shall embrace all wharves, piers, docks and other structures, except bridges and tunnels” that are erected along the waterfront of such locality and that extend into those waters to the extent such structures lie within the territorial jurisdiction of the Commonwealth.

¹² See § 28.2-1203(A) (2009): “It shall be unlawful for any person to build, dump, trespass or encroach upon or over, or take or use any materials from the beds of the bays, ocean, rivers, streams, or creeks which are the property of the Commonwealth, unless such act is performed pursuant to a permit issued by the [Virginia Marine Resources] Commission or is necessary for the following. . . .”

¹³ Section 28.2-1208(A) (2009). The statute was amended in 2009 to incorporate renewable energy projects, and now provides that the VMRC “may” enter into offshore renewable energy leases that authorize a lessee to “generate electrical energy from wave or tidal action, currents, offshore winds, or thermal or salinity gradients, and transmit energy from such sources to shore.” *Id.*

¹⁴ When deciding whether to issue permits for the use of state-owned bottomlands, the VMRC “shall be guided in its deliberations by the provisions of Article XI, Section 1 of the Constitution of Virginia[.]” and it shall “consider the public and private benefits of the proposed project and exercise its permitting authority consistent with the public trust doctrine as defined by the common law of the Commonwealth . . . in order to protect and

safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia.” Section 28.2-1205(A) (2009). The VMRC also shall consider a proposed project’s effect on other reasonable and permissible uses of state waters and state-owned bottomlands; marine and fisheries resources of the Commonwealth; tidal wetlands; adjacent or nearby properties; water quality; and submerged aquatic vegetation. *Id.* A prior opinion of the Attorney General interpreted this statutory provision to mean that the VMRC is authorized to consider “only the direct physical effects of proposed projects upon adjacent or nearby properties and is not authorized to consider broad questions of land use policy and planning.” 1972-1973 Op. Va. Att’y Gen. 188, 189-190. Since that Opinion was issued, the General Assembly has not amended § 28.2-1205(A) to require the VMRC to consider more than the direct, physical effects of proposed projects upon adjacent or nearby properties. Therefore, during its permit review process, VMRC would evaluate a proposed offshore wind energy project’s impact on adjacent or nearby properties, but not impacts on property owners that typically are addressed in local land use ordinances, such as impeded sight lines, height and noise restrictions, etc.

In addition, in accordance with § 28.2-1208(E), the VMRC in coordination with other state agencies maintains a State Subaqueous Minerals and Coastal Energy Management Plan that includes provisions for the preparation of an environmental impact statement) when an applicant is seeking a lease of bottomlands for a proposed project. Pursuant to that Plan, the lease applicant must prepare and submit to DEQ an environmental impact statement that includes a “description of the environmental impact of the proposed activities, methods, or plans, ... including but not limited to... [t]he nature and expected duration of any activity that will produce noise levels which could reasonably be expected to have an adverse impact upon people or wildlife” and “[t]he nature and size of any operation that will be visible from any present public roadway or from any major public-use area or viewpoint”; and a “description of mitigating measures proposed to minimize the adverse impact of the proposed activities.” State Minerals Management Plan (Rev. Aug. 2004), Section III(D) at 11-12. The Plan requires that no lease be awarded until DEQ, in cooperation with “the responsible agency” (VMRC, for offshore wind projects), determines that the environmental impact statement and required public hearings have been completed “to the satisfaction of the state” and the Governor has approved the lease. *Id.*, Section III(C), at 10. Thus, when developing an environmental impact statement as part of the VMRC’s leasing process for an offshore wind project, DEQ could address some of the issues typically covered by the permit by rule local government certification requirements. Nonetheless, such action would not constitute the certification by the governing body of a locality that is required by § 10.1-1197.6(B)(2). In addition, the VMRC is not required to enter into a lease for a proposed offshore wind project. The statutory language is permissive, so it may elect to issue only a permit for such a project.

¹⁵ Bd. of Supvrs. v. Countryside Inv. Co., 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999) (quoting Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975)).

¹⁶ Cnty. Bd. v. Brown, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); *accord* Gordon v. Bd. of Supvrs., 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967).

¹⁷ Any doubt as to the existence of such power must be resolved against the locality. *See* City of Richmond v. Bd. of Supvrs., 199 Va. at 684, 101 S.E.2d at 645; 2009 Op. Va. Att’y Gen. 41, 42.

¹⁸ Section 15.2-2280 (2008) (“Any locality may, by ordinance, classify *the territory under its jurisdiction* or any substantial portion thereof into districts of such number, shape and size as it may deem best suited to carry out the purposes of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following: 1. The use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses; 2. The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures; 3. The areas and dimensions of land, *water*, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures ... ; or 4. The excavation or mining of soil or other natural resources”) (emphasis added).

¹⁹ Examples of such a situation would be when the VMRC has granted a[n easement or] lease pursuant to § 28.2-1208(A), or where private ownership is claimed pursuant to a “king’s grant” as discussed *supra* note 9.

²⁰ The concept that localities do not have authority over the use of offshore waters and state-owned bottomland within their boundary lines is upheld by § 29.1-744.4, which provides localities with authority, after providing notice to the state Department of Game and Inland Fisheries (DGIF), to establish by ordinance “‘pass-through’ zones in any portion of a waterway within its territorial limits where congestion of watercraft traffic routinely poses a significant safety risk to persons in such designated area.” Logic dictates that such an explicit grant of

authority, subject to a state agency's approval, would not be necessary if localities had general authority over activities in the waters within their drawn territorial boundaries. The same argument applies to § 29.1-744, which provides that any political subdivision of the Commonwealth may apply to the Board of Game and Inland Fisheries for special rules and regulations concerning the safe and reasonable operation of vessels on any water within its territorial limits; any county, city or town may enact ordinances which parallel general law regulating the operation of vessels on any waters within its territorial limits, including the marginal adjacent ocean, and the conduct and activity of any person using such waters; and any county, city or town may, by ordinance after providing notice to DGIF, establish "no wake" zones along the waterways within the locality in order to protect public safety and prevent erosion damage to adjacent property. In addition, § 29.1-748.1 authorizes the City of Virginia Beach to regulate, in any portion of a waterway located solely within its territorial limits, the minimum distance that personal watercraft may be operated from the shoreline in excess of the slowest possible speed required to maintain steerage and headway. These laws concern limited delegations of authority to regulate an activity (boating) that generally is the state's responsibility (*see* Chapter 7, Boating Laws, of Title 29.1 of the *Code of Virginia*), not a broad grant of authority to localities to extend their land use regulations to facilities and activities in their territorial waters. In addition, a prior opinion of the Attorney General noted that "the State's use of State-owned bottom is not subject to local regulation, but the exercise of a riparian landowner's property rights which encroach on State-owned bottom is validly subject to local regulation" because of riparian owners' common law right to construct a pier or wharf opposite his riparian lands, subject to reasonable regulation by the state. *See* 1985-1986 Op. Va. Att'y Gen. 108, 111 n.5. In that instance, the riparian owners' common law right to construct a pier or wharf over state-owned bottomland had been codified as subject to local regulation (*see* § 28.2-1203(A)(5)); there is no comparable requirement in the 2009 permit by rule statutes.

The Virginia Supreme Court has held that private telecommunications companies' proposal to build telecommunications towers on land within a Virginia Department of Transportation (VDOT) right of way pursuant to a lease with VDOT placing primary use and control of the land with the lessees had to be submitted to the local planning commission for approval because § 15.2-2232(A) requires that no "public utility facility or public service corporation facility other than a railroad facility or an underground natural gas or underground electric distribution facility of a public utility ..., whether publicly or privately owned, shall be constructed, established or authorized, unless and until the general location or approximate location, character, and extent thereof has been submitted to and approved by the [local planning] commission as being substantially in accord with the adopted comprehensive plan or part thereof." *See* Bd. of Spvrs. of Fairfax Cnty. v. Washington, D.C. SMSA L.P., 258 Va. 558, 565-66, 522 S.E.2d 876, 880-81 (1999). That case is distinguishable, however, because the state-owned right of way was onshore, within Fairfax County's territorial jurisdiction; state-owned bottomlands beyond the mean low water mark are not. In addition, § 15.2-2232 provided specific statutory authority for the County to require planning commission approval for such projects.

OP. NO. 10-052

CONSERVATION: EROSION AND SEDIMENT CONTROL LAW – ENFORCEMENT

Section 10.1-566(c) provides for two distinct orders to enforce permit requirements: an initial order that applies only to land disturbing activities and a second, more restrictive order encompassing all construction activities.

THE HONORABLE JAMES E. EDMUNDS, II
MEMBER, HOUSE OF DELEGATES
JULY 30, 2010

ISSUES PRESENTED

You inquire regarding the application of stop work orders issued pursuant to *Virginia Code* § 10.1-566(C), which deals, generally, with the ability to suspend construction activities when a building site does not meet certain permit or plan approval

requirements. Specifically, you ask whether such orders apply to all construction activities on a particular work site or to only those activities involving earth disturbance; and you also ask whether, given certain assumptions, the building official has the authority to allow some construction to continue during the stop work period.

RESPONSE

It is my opinion that § 10.1-566(C) provides for two distinct orders that may be issued to compel compliance with permit and plan approval requirements: 1) an initial order that applies only to land disturbing activities and 2) a more restrictive second order encompassing all construction activities that may be issued for noncompliance with the first order. It is further my opinion that the building official lacks the authority to limit the scope of the second order once it is issued.

BACKGROUND

For purposes of this opinion, I will assume that the conditions precedent to employing the enforcement mechanisms of § 10.1-566(C) are present. Specifically, this opinion assumes that the building official is the proper designee of the chief administrative officer for issuance of such an order and that one of the following situations exists: 1) a sworn complaint of a permit violation has been received and proper notice of the complaint has been given to the landowner, 2) noncompliance presents imminent danger of harmful erosion or sediment deposition in the waters of the state's watersheds, or 3) land disturbing activities have begun without an approved plan or the required permits.¹

APPLICABLE LAW AND DISCUSSION

In order to prevent "the unreasonable degradation of properties, stream channels, waters and other natural resources,"² the General Assembly enacted the Erosion and Sediment Control Law.³ The law requires persons who intend to "engage in any land-disturbing activity" to submit a plan to the applicable authority, who must then review and approve or disapprove the plan.⁴

The Code also allows the authority enforcing the erosion and sediment control law to take action in the event of violations.⁵ The applicable statute can be applied based on its plain and unambiguous meaning.⁶ Section 10.1-566 provides two levels of orders to force compliance with the law. First, to force an owner to rectify violations, the appropriate official may

issue an order requiring that all *or part* of the *land-disturbing activities* permitted on the site be stopped until the specified corrective measures have been taken or, if land-disturbing activities have commenced without an approved plan . . . , [the official may issue an order] requiring that all of the land-disturbing activities be stopped until an approved plan or any required permits are obtained.^[7]

As the language makes clear, this order applies only to "land disturbing activities" and it permits all or part of such activities to be stopped. Once served upon the proper party, the order remains in effect for seven days.⁸

Once the seven-day period has passed, the authority tasked with enforcing the law is given the discretion to issue a second, more stringent order:

“[i]f the alleged violator has not obtained an approved plan or any required permits . . . the chief administrative officer or his designee may issue an order to the owner requiring that *all construction and other work* on the site, other than corrective measures, be stopped until an approved plan and any required permits have been obtained.”^[9]

With respect to the first stop work orders, the Code contemplates flexibility to ensure compliance. Under the plain language of the statute, a second order is different in its nature and scope. Although the issuance of this secondary order is discretionary, the General Assembly has granted the building official no authority to limit the scope these second orders.

I also note that, although § 10.1-566(A) provides specialized treatment for a “single family residence” by allowing a plan-approving authority to waive the certificate of compliance requirement, the stop work order provision found in § 10.1-566(C) makes no distinction between single family residences and other construction projects that occur without an approved plan or the required permits.

CONCLUSION

Accordingly, it is my opinion that, whereas initial orders issued to redress violations of erosion and sediment control schemes may be limited to suspending only land-disturbing construction activities, subsequent orders, designed to enforce the initial order and to compel obtainment of necessary plan approval or permits, must stop all construction activities on the site, other than corrective measures, until such approval or permits are obtained.

¹ See VA. CODE ANN. § 10.1-566(C) (2006).

² Section 10.1-561 (2006).

³ VA. CODE ANN. §§ 10.1-560 through 10.1-571 (2006 & Supp. 2010).

⁴ Section 10.1-563 (2006).

⁵ See § 10.1-566.

⁶ In our interpretation of this statute, we must “ascertain and give effect to the intention of the legislature [and] that intention must be gathered from the words used.” *Watkins v. Hall*, 161 Va. 924, 930, 172 S.E. 445, 447 (1934). When the language of a statute is clear and unambiguous, the statute’s plain meaning must be accepted. *Virginia Dep’t of Labor & Indus. v. Westmoreland Coal Co.*, 233 Va. 97, 99, 353 S.E.2d 758, 760-61 (1987). *Roberts v. Roberts*, 260 Va. 660, 536 S.E.2d 714 (2000).

⁷ Section 10.1-566(C) (emphasis added).

⁸ *Id.*

⁹ *Id.* (emphasis added).

OP. NO. 10-067

CONSTITUTION OF THE UNITED STATES: FIRST AMENDMENT, ESTABLISHMENT CLAUSE – HOLIDAY DISPLAYS

CONSTITUTION OF VIRGINIA: ARTICLE I, § 16

Localities may permit holiday displays depicting religious symbols and events, provided the local governing body ensures appropriate content and context.

THE HONORABLE ROBERT G. MARSHALL
MEMBER, HOUSE OF DELEGATES
AUGUST 20, 2010

ISSUES PRESENTED

You inquire whether Loudoun County, under the U.S. and Virginia constitutions and our present statutes, is compelled to prohibit holiday displays – both religious and non-religious – on public property; and if not so compelled, under what conditions religious holiday displays, including those honoring the birth of Jesus Christ, are permitted.

RESPONSE

It is my opinion that a local governmental entity is never categorically compelled to prohibit holiday displays, including those incorporating recognizably religious symbols, because governments enjoy considerable discretion in accommodating the religious expression of their citizens and employees and in their own recognition of traditional seasonal holidays. It is further my opinion that displays depicting the birth of Jesus Christ are permissible provided the government ensures appropriate content and context.

APPLICABLE LAW AND DISCUSSION

The First Amendment to the Constitution of the United States declares that “Congress shall make no law respecting an establishment of religion.”¹ Article I, § 16 of the Constitution of Virginia provides that

the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please.^[2]

Turning first to the Virginia Constitution, the original meaning of the words “respecting an establishment of religion” is probably reflected in Chapter II of the October 1776 Acts of the General Assembly, which gives practical effect to § 16 of the Virginia Declaration of Rights of June 12, 1776. The October enactment partially disestablished the church of Virginia by striking down “several oppressive acts of parliament respecting religion.”³ It also freed dissenters from taxation that supported the church so that “equal liberty, as

well religious as civil,”⁴ would prevail. That act also ended statutory salaries for the Anglican clergy.⁵ The types of laws “respecting religion” referenced were those designed to maintain a state church, including provisions requiring church attendance and prescribing modes of worship.⁶

The Virginia Establishment Clause adopted by the Convention of 1829-30⁷ reflects an understanding that religious equality and denominational nondiscrimination lie at the core of establishment concerns and doctrine, along with prohibition of religious tests and taxation for the support of religion. Joseph Story contemporaneously wrote of the Federal Establishment Clause: “The real object of the amendment was ... to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.”⁸

Thus, viewed from a reasonable textualist and original understanding perspective, it is doubtful that the Virginia Establishment Clause limits holiday displays on public property. Instead, the Virginia Establishment Clause is implicated only by state action directly supporting or preferring a particular church. For purposes of the Virginia Constitution, then, Article I, § 16 does not forbid a display merely because of its religious content. This provision, however, does forbid religious favoritism toward a particular sect or denomination.⁹

Current Federal Establishment Clause doctrine, on the other hand, does address governmental displays with religious content. Unfortunately, the United States Supreme Court’s contemporary Establishment Clause jurisprudence is “confusing and confused.”¹⁰ In analyzing Establishment Clause jurisprudence as it now exists two conclusions are nonetheless clear: (1) governmental accommodation of religion is constitutionally permitted, and in some circumstances is required; and (2) holiday displays erected by governments can be validly exhibited depending on content.

Constitutional accommodation of religion begins in the text itself and its history is deeply rooted. The oaths found at Article II, § I, cl. 8 and Article VI, cl. 3 permit affirmation as an alternative to swearing. This option is given to “known denominations of men, who are conscientiously scrupulous of taking oaths (among which is that pure and distinguished sect of Christians, commonly called Friends, or Quakers).”¹¹ Nondenominational Sunday church services were conducted in the chamber of the United States House of Representatives for a considerable period, and while President, Thomas Jefferson was in regular attendance. Likewise James Madison, the sponsor of the First Amendment in Congress, attended when he succeeded to the Presidency.¹²

The practice of governmental accommodation of religion also is embedded in case law and statutes. Applying the Establishment Clause to the States for the first time in *Everson v. Board of Education*, the Court recognized that the Clause “requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.”¹³ Although *Everson* accepted the concept of a “wall of separation between church and state,” taken from Jefferson’s letter to the Danbury Baptist Association,¹⁴ the Court explained in *Lynch v. Donnelly* that the “metaphor itself is not a wholly accurate description of the practical aspects of the

relationship that in fact exists between church and state.”¹⁵ That is so because “[i]t has never been thought either possible or desirable to enforce a regime of total separation”¹⁶ Not only does the Constitution not “require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”¹⁷

Applying these principles, Loudoun County must accommodate religious items within the personal space of employees under certain circumstances.¹⁸ In addition, where the County already has provided a public forum or limited public forum, it will usually lack the right to exclude a religious display of reasonable duration based solely upon content.¹⁹ Even where no such forum previously has been created, the County is free to create a nondiscriminatory forum for recognition of holidays, including Christmas, if it makes clear that the County itself is not communicating a religious message.²⁰

Moreover, irrespective of religious accommodation, the County is free to communicate its own recognition of holidays, including Christmas, as long as overtly Christian symbols are balanced with other religious and secular ones in a way that communicates to reasonable, informed observers that the County is not making a religious statement.²¹ Because secular symbols can insulate innately religious symbols from constitutional attack, decoration of public buildings with such secular items as lights, candy canes, wreaths, poinsettias, fir trees, snowflakes, and red and green ribbons should raise no serious constitutional objection.²²

In adjudicating public display cases, the Fourth Circuit employs a combination of the *Lemon* and government endorsement tests.²³ The *Lemon* three-prong test seeks to determine whether a governmental action (1) has a secular purpose, (2) whether its principal or primary effect is one that neither advances or inhibits religion, and (3) whether the action threatens excessive governmental entanglement with religion.²⁴ Although *Mellen* initially identified *Lemon* and governmental endorsement as competing tests,²⁵ it then merged the governmental endorsement test into the second prong of *Lemon* by holding that state action which “suggests to the reasonable, informed observer that [government] is endorsing religion,” demonstrates that the challenged action has the principal or primary effect of advancing religion.²⁶ Although the inquiry is necessarily fact-specific, a holiday display that is not exclusively religious and one that is a part of a broader celebration of the holiday season would satisfy the *Lemon* test.²⁷

In sum, although it is certainly possible for a locality to violate the Establishment Clause by exhibiting or authorizing Christmas and other holiday displays,²⁸ such displays are not *per se* impermissible provided that the County is careful with respect to content and context.

CONCLUSION

Accordingly, it is my opinion that a local governmental entity is never categorically compelled to prohibit holiday displays, including those incorporating recognizably religious symbols, because governments enjoy considerable discretion in accommodating the religious expression of their citizens and employees and in their own recognition of traditional seasonal holidays. It is further my opinion that displays depicting the birth of

Jesus Christ are permissible provided the government ensures appropriate content and context.

¹ U.S. CONST. amend. I.

² VA. CONST. art. I § 16.

³ 9 Hening's Statutes at Large 164 (1776).

⁴ *Id.*

⁵ *Id.* at 165, 166.

⁶ See 4 Hening's Statutes at Large 204-09 (1727).

⁷ A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, Vol. I at 292 (Univ. Press of Va., Charlottesville 1974).

⁸ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, VOL. III § 1871 (1833).

⁹ The Supreme Court of Virginia has noted that it has "always been informed by the United States Supreme Court Establishment Clause jurisprudence in [its] construction of Article I, § 16." *Virginia Coll. Bldg. Auth. v. Lynn*, 260 Va. 608, 626, 538 S.E.2d 682, 691 (2000). The Court has not held that the Virginia constitutional provision and the federal constitution's Establishment Clause are the same. The text and history of Article I, § 16 do not support a contention that the Clause prohibits displays on public property merely because of their religious content.

¹⁰ *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993). Compare *Van Orden v. Perry*, 545 U.S. 677 (2005) (display of Ten Commandments at Texas State Capitol constitutional) (4-4 vote with Breyer, J., concurring in the judgment), with *McCreary County v. ACLU*, 545 U.S. 844 (2005) (display of Ten Commandments at Kentucky county courthouse unconstitutional) (5-4).

¹¹ STORY, *supra* note 4, § 1838.

¹² JAMES H. HUTSON, THE FOUNDERS ON RELIGION at xii (Princeton University Press 2005).

¹³ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

¹⁴ *Id.* at 16 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

¹⁵ *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

¹⁶ *Id.* (citing *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973)).

¹⁷ *Id.* (citing *Zorach v. Clauson*, 343 U.S. 306, 314, 315 (1952); *Illinois ex rel. McCollum v. Bd. of Education*, 333 U.S. 203, 211 (1948)). See also 42 U.S.C. § 2000e-2(a)(1) (2006) (Civil Rights Act requires employers to reasonably accommodate religion); 42 U.S.C. §§ 2000e-2000e-17 (2006) (ministerial exception to Civil Rights Act); 42 U.S.C. § 2000cc-1 (2006) (Religious Land Use and Institutionalized Person Act); 50 U.S.C. Appx. § 456(j) (conscientious objectors).

¹⁸ *Warnock v. Archer*, 380 F.3d 1076, 1082 (8th Cir. 2004) (display of personal Bible and framed scriptural quotation by school district superintendent in his office were constitutionally protected and did not violate Establishment Clause).

¹⁹ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1990); *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1387-92 (11th Cir. 1993) (*en banc*).

²⁰ *ACLU v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1995) (rustic stable without figures on capitol grounds did not violate Establishment Clause because prominently displayed notice stated that the area was a public forum available to all citizens and that the display neither was constructed with public funds nor constitutes endorsements by the state of any religion or religious doctrine). See also *Capitol Square Review and Adv. Bd. v. Pinette*, 515 U.S. 753 (1995) (although unable to agree on a rationale, Court holds that the government may not refuse on Establishment Clause grounds to display religious symbol when nature of the public forum is known or publicly announced). *Pinette* effectively overrules *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990) (private club may not display religious holiday symbols on public property because public may mistakenly interpret private display as a public one, notwithstanding disclaimer that display was erected by private club).

²¹ See *Lynch*, 465 U.S. at 685.

²² See *ACLU v. Schundler*, 168 F.3d 92, 95 (3d Cir. 1999) (display containing crèche, Menorah, Christmas tree, figures of Santa Claus and Frosty the Snowman, sled, Kwanzaa symbols, and signs stating that the display was one of series put up by city throughout year to celebrate its residents' cultural and ethnic diversity did not violate Establishment Clause); *Mather v. Mundelein*, 864 F.2d 1291, 1292-93, *reh'g denied*, 869 F.2d 356 (7th Cir. 1989) (nativity scene in park near City Hall did not violate Establishment Clause because it was located in midst of other secular symbols of season).

²³ *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) (“[U]ntil the Supreme Court overrules *Lemon* and provides an alternative analytical framework, this Court must rely on *Lemon* in evaluating the constitutionality of legislation under the Establishment Clause” (citations omitted)).

²⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

²⁵ *Mellen*, 327 F.3d at 370.

²⁶ *Id.* at 374-75. See also *Lambeth v. Bd. of Comm’rs*, 407 F.3d 266 (4th Cir. 2005) (applying same test to the motto “In God We Trust” on county building).

²⁷ See *Elewski v. City of Syracuse*, 123 F.3d 51 (2nd Cir. 1997) (applying *Lemon* test and holding that manger scene and menorah display did not violate the Establishment Clause when considered alongside Christmas tree and other secular symbols such as lights, greenery, wreaths, a snowman and a reindeer).

²⁸ *ACLU v. Birmingham*, 791 F.2d 1561 (6th Cir. 1986), *cert. denied*, 479 U.S. 939 (1986) (city-owned and city-sponsored nativity scene, standing alone as only clearly identifiable symbol chosen by city to mark its holiday celebration, violates Establishment Clause).

OP. NO. 10-105

CONSTITUTION OF THE UNITED STATES: FOURTH AMENDMENT – SEARCH AND SEIZURE OF STUDENTS’ PROPERTY

EDUCATION: PUPILS – DISCIPLINE (STUDENT SEARCHES)

Searches and seizures of students’ cell phones and laptops is permitted when there is reasonable suspicion that the student is violating the law or rules of the school.

THE HONORABLE ROBERT B. BELL
MEMBER, HOUSE OF DELEGATES
NOVEMBER 24, 2010

ISSUES PRESENTED

You ask in what circumstances middle and high school principals and teachers may seize and search students’ cellular phones and laptops to combat “cyber bullying” and how school officials can address student “sexting” without violating Virginia law themselves.

RESPONSE

It is my opinion that searches and seizures of students’ cellular phones and laptops are permitted when there is a reasonable suspicion that the student is violating the law or the rules of the school and, further, that school officials should not share explicit materials depicting minors with other school personnel, but rather that the material should be brought to the attention of the appropriate law enforcement agents.

APPLICABLE LAW AND DISCUSSION

The Fourth Amendment to the Constitution of the United States provides that “[t]he right of the people to be secure in their persons, house, papers, and effects, against unreasonable search and seizure, shall not be violated.”¹ This “prohibition on unreasonable searches and seizures applies to searches conducted by public school officials.”² “To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.”³ The Supreme Court of the United States typically requires that a search be conducted only pursuant to a warrant supported by probable cause.⁴ When the purpose of a Fourth Amendment search is not to discover evidence of a crime, however, but is intended to serve some “special needs, beyond the normal need for law enforcement,”⁵ the Supreme Court has held that a reasonable, articulable suspicion may be all that is necessary to satisfy constitutional requirements.⁶

The supervision and operation of schools present “special needs” beyond normal law enforcement and, therefore, a different framework is justified.⁷ The United States Supreme Court concluded in *New Jersey v. T.L.O.* that “maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures. . . [that] preserves the informality of the student-teacher relationship.”⁸ The Court recognized the competing interests that are distinct to the school environment: “On one side of the balance are arrayed the individual’s legitimate expectation of privacy and personal security; on the other, the government’s need for effective methods to deal with breaches of the public order.”⁹ The court modified ordinary Fourth Amendment analysis in two significant ways. First, an “accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require the strict adherence to the requirement that searches be based on probable cause.”¹⁰ Second, the warrant requirement does not apply to school officials who search a student under their authority.¹¹

Accordingly, searches of a student’s belongings – including an examination of the messages found on a cell phone or laptop – are justified if, when the search is made, the teacher or principal has “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”¹² In addition, the subsequent search must be “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”¹³

Your first inquiry specifically presents the following scenario: a student reports to a teacher that he received a text message from another student that is either threatening or criminal or violates the school’s bullying policy. You ask whether the teacher can seize the alleged bully’s cellular phone and conduct a search of the outgoing text messages to investigate the claim. Recognizing that no court has considered the matter and that a definitive determination whether the situation you present creates a reasonable suspicion of wrongdoing depends on a complete and detailed set of facts,¹⁴ it is my general opinion that a search of a cellular phone by a school principal or teacher under these circumstances would be reasonable under the Fourth Amendment and the standard established in *New Jersey v. T.L.O.*¹⁵ Moreover, under *T.L.O.*, once a reasonable

suspicion of wrongdoing exists, a search of a student's personal belongings does not require the student's consent or the consent of his parents.¹⁶

Your second inquiry concerns whether a teacher who has discovered sexually explicit material on a student's cellular phone can show the material to another teacher or a principal for disciplinary purposes without violating Virginia law. The outcome of the inquiry depends on whether your question relates solely to sexually explicit material involving adults or whether the sexually explicit material involves children.

If a teacher, upon lawful search of a student's cellular phone, discovers sexually explicit material involving adults, he or she may show the material to a principal or another teacher for disciplinary purposes pursuant to any existing school policies without violating Virginia law. If, however, the discovered material involves a person under the age of eighteen, it may constitute child pornography,¹⁷ the knowing possession and distribution of which is prohibited under § 18.2-374.1:1. Any person who distributes such material shall be punished by five to twenty years imprisonment,¹⁸ and, therefore, prudence counsels that a teacher who discovers sexually explicit visual material involving a suspected minor during a legal search of a student's cellular phone should refrain from showing, transmitting, or distributing such material.¹⁹ Upon discovery of potential child pornography, the teacher or principal should promptly contact the appropriate law-enforcement agency within his jurisdiction and turn the material over to one of its authorized agents without distributing the material to others. The teacher discovering the material may, of course, discuss the nature of the material with a principal or another teacher for disciplinary purposes pursuant to the school's respective policies.²⁰ As with the legal standard governing searches and seizures within the school context, a definitive determination of whether an action constitutes a criminal violation is a matter reserved to Commonwealth's Attorneys and the courts.

CONCLUSION

Accordingly, it is my opinion that searches of students' cellular phones and laptops by school officials are permitted when based on reasonable suspicion that the particular student is violating the law or the rules of the school and the search is "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."²¹ In instances where a school official discovers sexually explicit material involving an identifiable minor, the official should refrain from showing, transmitting, or distributing that material to any other person except an authorized agent of the appropriate law-enforcement agency.

¹ U.S. CONST. amend. IV.

² *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985).

³ *Chandler v. Miller*, 520 U.S. 305, 313 (1997).

⁴ *See Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

⁵ *New Jersey v. T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

⁶ *See id.* at 341; *see also Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) ("While 'reasonable suspicion' is a less demanding standard than probable cause . . . , the Fourth Amendment requires at least a minimal level of objective justification.").

⁷ See *T.L.O.*, 469 U.S. at 340.

⁸ *Id.* at 340.

⁹ *Id.* at 337.

¹⁰ *Id.* at 341.

¹¹ *Id.* at 340.

¹² *Id.* at 342. See also *In the Interest of Jane Doe*, 887 P.2d 645 (Haw. 1994) (applying the *T.L.O.* framework and upholding search of a student's purse).

¹³ *Id.*; see also *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2643 (2009) (finding a strip-search of student by school officials unreasonable and stating that *T.L.O.*'s mandate that school searches be reasonable in scope requires a specific suspicion that a student is hiding evidence of wrongdoing in his or her underwear "before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts").

¹⁴ Factors school officials may consider include, for example, the perceived credibility of the person making report and whether the received message is still on the phone and made accessible to the official.

¹⁵ It should be noted that, if the search is being conducted by a school security officer, it may be governed by the heightened probable-cause standard. For a more thorough discussion of the standards governing school searches and seizures by school security officers, see 2001 Op. Va. Att'y Gen. 109.

¹⁶ See *T.L.O.*, 469 U.S. at 341–42.

¹⁷ "Child pornography" is defined as "sexually explicit visual material which utilizes or has as a subject an identifiable minor." VA. CODE ANN. § 18.2-374.1(A) (2009). "Sexually explicit visual material" means "a picture, photograph, drawing, sculpture, motion picture film, digital image, including such material stored in a computer's temporary Internet cache when three or more images or streaming videos are present, or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, a state of sexual excitement, sexual conduct, or sadomasochistic abuse[.]" Section 18.2-374.1(B).

¹⁸ Section 18.2-374.1:1(A), (C).

¹⁹ Section 18.2-374.1:1(C) prohibits the "display with lascivious intent" and the "distribution" of child pornography. A school official who discovers child pornography and displays it to another school official for disciplinary purposes would lack lascivious intent. See *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970) (defining "lascivious" as "a state of mind that is eager for sexual indulgence, desirous of incident to lust or of inciting sexual desire and appetite."). The "distribution" of child pornography under our statute, however, does not require lascivious intent. Although it is highly unlikely that a prosecution would be initiated based on a school official showing the images to another school official in good faith and for legitimate purposes, the absence of an exception for school officials, noted below, signals caution in engaging in conduct that could be viewed as the distribution of child pornography.

²⁰ The Code does provide an exception for materials possessed for bona fide governmental purposes, but the exception extends only to "a physician, psychologist, scientist, attorney, or judge who possesses such material in the course of conducting his professional duties[.]" Section 18.2-374.1:1(H). School officials are not among those listed in this exception.

²¹ *T.L.O.*, 469 U.S. at 342.

OP. NO. 10-009

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS – RIGHT TO KEEP AND BEAR ARMS

Private entity leasing government property for event generally may regulate or prohibit carrying or possession of firearms on that property for such event.

THE HONORABLE THOMAS A. “TAG” GREASON
MEMBER, HOUSE OF DELEGATES
MARCH 16, 2010

ISSUE PRESENTED

You inquire whether a private entity that has leased property from a local government for the purpose of hosting an event may lawfully prohibit persons from carrying a firearm on such property and for such event.

RESPONSE

It is my opinion that a private entity leasing government property for an event generally may regulate or prohibit the carrying or possession of firearms on that property for such event.

BACKGROUND

You note that the American Red Cross hosts an annual “waterfront festival” in the City of Alexandria. You state, however, that the 2010 event has been cancelled. The festival occurs on public land that the Red Cross leases from the City. At this festival, the Red Cross has adopted a policy banning persons from carrying firearms. Therefore, you inquire regarding the authority of the Red Cross to initiate such a ban.

APPLICABLE LAW AND DISCUSSION

“Virginia follows the Dillon Rule of strict construction,” which provides that “local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”¹ The General Assembly has provided broad powers to local governments to lease local government property.² Virginia law imposes no restraints on localities with respect to lease terms and firearms.

The right to bear arms is protected by the Constitutions of Virginia³ and of the United States.⁴ St. George Tucker, a Virginian who authored the first commentary on the Constitution in 1803, described the right to bear arms as “the true palladium of liberty.”⁵ Nevertheless, “[l]ike most rights, the right secured by the *Second Amendment* is not unlimited.”⁶ The right is “not a right to keep, and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁷

As a general proposition, the Constitution acts as a restraint on government, not private actors. It is well established that private actors may do certain things on government property that the government itself could not do. For example, if the government agrees to make facilities available to private parties for the purpose of teaching morals and character development to children,⁸ it cannot exclude one group that happens to engage in prayer and reading Bible stories. In contrast to the government, a private group may exclude from a meeting persons who disagree with the private entity’s viewpoint. For example, if a church leases an auditorium from a high school for its church services, the

church could exclude from the church service persons whose religious views are not in accord with those of the church leasing the space. If a local Republican committee held a meeting in a room of the local library, it could exclude Democrats from the meeting.¹⁰ A public library, acting on its own, could not similarly exclude members of one party from a particular public meeting because it disagreed with their viewpoint.¹¹ The key is whether the actions are taken by a private party or by the government.

In the context of lawsuits seeking to recover money damages for events that occurred on land leased from the government, courts have concluded that the actions of private parties that leased government property generally were not attributable to the state.¹² Similarly here, the actions to exclude firearms from a street festival were taken by a private group, not the government. The fact that the property was leased from the government by a private entity does not transform the action into one taken by the government.¹³

Having determined that a private entity leasing property from a local government may regulate the conduct of citizens pursuant to considerations of the status of invitee or a licensee, it must be stated that a locality cannot circumvent the constitutional rights of citizens through the expedient of leasing government land to private entities who effectively act as agents for the local government. That scenario, however, does not appear to present in the event that you describe.

CONCLUSION

Accordingly, it is my opinion that a private entity leasing government property for an event generally may regulate or prohibit the carrying or possession of firearms on that property for such event.

¹ *Tabler v. Bd. of Supvrs.*, 221 Va. 200, 202, 269 S.E.2d 358, 359 (1980).

² *See* VA. CODE ANN § 15.2-1800(B) (2008).

³ “[T]he right of the people to keep and bear arms shall not be infringed[.]” VA. CONST. art. I, § 13.

⁴ “[T]he right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. For purposes of this opinion, I assume that the Second Amendment applies to the states, an issue the Supreme Court of the United States has not yet decided.

⁵ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2805 (2008) (quoting 1 BLACKSTONE’S COMMENTARIES, app. 300, Note D, “View of the Constitution of the United States” (1803)).

⁶ *See id.* at 2816.

⁷ *Id.*

⁸ *See, e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978).

⁹ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109-10 (2001).

¹⁰ *See Kay v. N.H. Democratic Party*, 821 F.2d 31 (1st Cir. 1987) (holding that there is no constitutional violation when speaker is denied opportunity to address political party’s gathering because there was no government action).

¹¹ *Good News Club*, 533 U.S. at 106 (holding that state may establish limited public forum reserved “‘for certain groups or for the discussion of certain topics,’” but it “‘must not discriminate against speech on the basis of viewpoint’” (citations omitted)).

¹² *See Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442 (10th Cir. 1995) (holding that actions of private security company in patting down concertgoers for area owned by state university and leased by concert promoter were not actions of Utah government); *Lansing v. Memphis*, 202 F.3d 821, 832 (6th Cir. 2000) (“We

have been consistent in holding that a lease for public land or facilities from the government is insufficient evidence of a nexus between the state and the activities that take place on the land.”); *Green v. Racing Ass’n of Cent. Iowa*, 713 N.W.2d 234, 240 (Iowa 2006) (“Generally, a lease between a government entity and a private corporation ‘is insufficient, standing alone, to show state action.’” (citation omitted)).

¹³*Id.*

OP. NO. 10-059

CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS – QUALIFICATION TO HOLD ELECTIVE OFFICE

Article II, § 5 of the Virginia Constitution precludes localities from enacting an ordinance that would prevent spouses from concurrently holding interrelated public offices.

THOMAS M. SIMONS, ESQ.

TOWN ATTORNEY, TOWN OF GLASGOW

JULY 26, 2010

ISSUE PRESENTED

You ask whether, under Article II, § 5 of the Virginia Constitution, the town of Glasgow can enact an ordinance preventing spouses from concurrently holding interrelated elected public offices.

RESPONSE

It is my opinion that the General Assembly has not authorized localities to enact an ordinance preventing spouses from concurrently holding interrelated public offices and, therefore, such an ordinance would be impermissible under Article II, § 5 of the Virginia Constitution.

APPLICABLE LAW AND DISCUSSION

In determining the validity of a local government’s exercise of legislative authority, Virginia follows the Dillon Rule of strict construction that “provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”¹ “When a local ordinance exceeds the scope of this authority, the ordinance is invalid.”² You indicate that the Town Charter does not contain a section that would authorize such an ordinance. Therefore, the Town could not derive any authority to enact such an ordinance from its Charter.

Moreover, Article II, § 5 of the Constitution of Virginia provides that

[t]he only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year next

preceding his election and be qualified to vote for that office, except as otherwise provided in this Constitution.

Section 5 contains three exceptions that authorize the General Assembly to impose some restrictions on the general qualification requirement.³ None of these exceptions nor any other provision in the Constitution authorizes a locality to restrict eligibility for the office of a local governing body based on his or her status as a spouse of a current member of the governing body. As prior opinions of the Attorney General and other authority have concluded, neither the General Assembly nor a governing body may impose requirements on candidates for election to the governing body beyond those specified in the Virginia Constitution.⁴

CONCLUSION

Accordingly, it is my opinion that the General Assembly has not authorized localities to enact an ordinance preventing spouses from concurrently holding interrelated public offices and, therefore, such an ordinance would be impermissible under Article II, § 5 of the Virginia Constitution.

¹ *Marble Techs., Inc., v. City of Hampton*, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010) (citation omitted).

² *City of Chesapeake v. Gardner Enters., Inc.*, 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997).

³ The three exceptions to the qualifications to hold elective office in Article II, § 5 are: (a) the General Assembly may impose more restrictive geographical residence requirements for election of its members, and may permit other governing bodies to impose more restrictive geographical residence requirements for election to such governing bodies; (b) the General Assembly may provide that residence in a local governmental unit is not required for election to designated local offices, other than the governing body; and (c) the section does not limit the power of the General Assembly to prohibit certain conflicts of interest, dual officeholding or other incompatible activities by elective or appointive officials.

⁴ See 1993 Op. Va. Att’y Gen. 44, 45-46 (Article II, § 5 prohibits General Assembly from amending city’s charter to provide that, in popular election of mayor, only elected members of city council or candidates for election to city council are eligible to be candidates for separate election as mayor). The Supreme Court of Virginia has long held that when the Virginia Constitution specifies qualifications for an office, that specification is an implied prohibition against legislative interference to change those qualifications. *Black v. Trower*, 79 Va. 123, 125-26 (1884). See also 1997 Op. Va. Att’y Gen. 36, 36-37 (a condition imposed by board of supervisors, when appointing a replacement member to the board, prohibiting the appointed replacement from later seeking election to the board is unconstitutional and void); 1991 Op. Va. Att’y Gen. 53, 54-55 (statute imposing a limit of two terms on members of local governing body imposes an additional qualification in violation of Virginia Constitution). See also 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 394-95 (1974) (qualifications for elective office prescribed in Virginia Constitution can neither be added to nor subtracted from except as expressly provided in Virginia Constitution).

OP. NO. 10-021

CONSTITUTION OF VIRGINIA: LEGISLATURE – ENACTMENT OF LAWS

Constitution must be amended prior to enactment of any bill that would require ‘super majority’ vote to lift moratorium on uranium mining.

THE HONORABLE DANNY W. MARSHALL, III
MEMBER, HOUSE OF DELEGATES
MARCH 31, 2010

ISSUE PRESENTED

You note that the effects of uranium mining in Virginia would impact only a few select localities, including your region. Therefore, you seek guidance concerning a bill that would require a supermajority vote by the General Assembly to lift the current moratorium on uranium mining.

RESPONSE

It is my opinion that the Constitution of Virginia must be amended prior to the enactment of any bill that would require a “super majority” vote to lift the moratorium on uranium mining.

APPLICABLE LAW AND DISCUSSION

Pursuant to § 45.1-283, the General Assembly has effectively banned the mining of uranium in Virginia. Section 45.1-283 prohibits “any agency of the Commonwealth” from accepting “permit applications for uranium mining ... until a program for permitting uranium mining is established by statute.”¹ I find no statutes that have established a program for uranium mining. The only statutory program in existence related to uranium is limited to exploratory activity.²

The Virginia Constitution provides that bills become law when “a majority of those voting in each house, which majority shall include at least two-fifths of the members elected to that house,” vote in favor of the bill.³ Given this express constitutional requirement, an amendment to the Constitution would be required to impose a “super majority” vote on any particular subject. Without such an amendment, the Constitution authorizes the General Assembly to overturn the existing ban by majority vote. Therefore, any law requiring a supermajority vote would be ineffectual absent such amendment. “Where statutory enactments ... come into conflict with constitutional principles, the latter must prevail.”⁴

CONCLUSION

Accordingly, it is my opinion that the Constitution of Virginia must be amended prior to the enactment of any bill that would require a “super majority” vote to lift the moratorium on uranium mining.

¹See also 1982 Va. Acts ch. 269, at 426, 427 (enacting § 42.1-272 (not set out in Code), which declares public policy that improper and unregulated uranium mining can adversely affect health, safety, and general welfare of Commonwealth’s citizens; noting also that additional statutes may be necessary to assure that any such mining does not adversely affect environment or public health and safety).

²See VA. CODE ANN. § 45.1-274(A) (2002) (requiring permit to commence exploration activity “as defined herein”). Section 45.1-723 defines “exploration activity” as that “limited to the drilling of test holes or stratigraphic or core holes ... for the purpose of determining the location, quantity, or quality of uranium ore.”

³VA. CONST. art. IV, § 11(d). I note that bills on certain subjects, such as ones creating or establishing a new office, require “the affirmative vote of a majority of all the members elected to each house.” *Id.*

⁴Commonwealth v. Owens-Corning Fiberglass Corp., 238 Va. 595, 600, 385 S.E.2d 865, 868 (1989).

OP. NO. 10-015

CONSTITUTION OF VIRGINIA: LEGISLATURE – FORM OF LAWS

Appropriation act that appropriates money and raises funds by taxes or fees would not violate single object rule of Constitution.

THE HONORABLE ROBERT G. MARSHALL
MEMBER, HOUSE OF DELEGATES
APRIL 14, 2010

ISSUE PRESENTED

You ask whether a single appropriation bill that provides for raising taxes or fees and also appropriates money violates Article IV, § 12 of the Constitution of Virginia, the “single object” provision.

RESPONSE

It is my opinion that an appropriation act that appropriates money and raises funds by taxes or fees even without a separate, accompanying bill would not, therefore, violate the single object rule of the Virginia Constitution.

BACKGROUND

You relate that at the time of your request, the General Assembly budget conferees tentatively had agreed to increase state-assessed fees by \$76 million. It is your understanding that these fee increases are to be included in an appropriation act, rather than by enacting separate legislation. Therefore, you inquire whether this arrangement would violate the “single object” provision of the Virginia Constitution.

APPLICABLE LAW AND DISCUSSION

Article IV, § 12 (“§ 12”) provides that “[n]o law shall embrace more than one object, which shall be expressed in its title. Nor shall any law be revived or amended with reference to its title, but the act revived or the section amended shall be reenacted and published at length.” In the leading case interpreting § 12,¹ the Supreme Court of Virginia held that the “one object” requirement was designed

to prevent the members of the legislature and the people from being misled by the title of a law. It was intended to prevent the use of deceptive titles as a cover for vicious legislation, to prevent the practice of bringing together into one bill for corrupt purposes subjects diverse and dissimilar ... and to prevent surprise or fraud in legislation

And, on the other hand, it was not intended to obstruct honest legislation, or to prevent the incorporation into a single act of the entire statutory law upon one general subject. It was not designed to embarrass legislation by compelling the multiplication of laws by the passage of separate acts on a single subject. Although the act or statute authorizes many things of a diverse nature ..., the title will be sufficient if the things authorized may be fairly regarded as in furtherance of the object expressed in the title. It is therefore to be liberally construed and treated, so as to uphold the law, if practicable. All that is required ... is that the subjects embraced in the statute, but not specified in the title, are congruous, and have natural connection with, or are germane to, the subject expressed in the title.^[2]

The various appropriation acts all contain broad language within their titles. For example, House Bill 29 is titled:

A Bill to amend and reenact Chapter 781 of the 2009 Acts of Assembly, which appropriated the public revenues and provided a portion of such revenues for the two years ending, respectively, on the thirtieth day of June, 2009, and the thirtieth day of June, 2010.^[3]

Similarly, House Bill 30 is titled:

A tentative bill for all appropriations of the Budget submitted by the Governor of Virginia in accordance with the provisions of § 2.2-1509, Code of Virginia, and to provide a portion of revenues for the two years ending respectively on the thirtieth day of June, 2011, and the thirtieth day of June, 2012.^[4]

The Virginia Supreme Court has interpreted the predecessor to § 12 in relation to an appropriation act.⁵ In that situation, the Governor had vetoed seven provisions of the 1940 Appropriation Act which he concluded violated the predecessor section.⁶ One of the vetoed provisions was related to the Office of Legislative Director.⁷ The dissenting opinion described that particular provision as changing “a vital part of the administrative system of the State government”⁸ by substantially altering the established method of filling such an important office and by dividing “the responsibility of two most essential administrative offices *established by general law*.”⁹ Despite this substantial change to state administrative offices and responsibilities established by general law, the Virginia Supreme Court held that the inclusion of such changes in a general appropriation act did not violate the Constitution, nor did the failure to list the provisions in the title of the act.¹⁰ Similarly, a 1984 opinion of the Attorney General concluded that an appropriation act did not violate the single object rule, notwithstanding the fact that it abolished a state agency and transferred its functions to another state agency.¹¹ In the Court’s most recent decision on § 12, it found no violation of the single object rule for a broad and comprehensive transportation bill.¹²

The Virginia Supreme Court repeatedly has held that acts of the General Assembly “are presumed to be constitutional unless the contrary is clearly shown.”¹³ “[E]very reasonable doubt shall be resolved in favor of [an act’s] constitutionality,” and “courts cannot strike down a statute enacted by the General Assembly unless it clearly appears that such statute does contravene some provision of the Constitution.”¹⁴

Of necessity, appropriation acts are complex and will affect many portions of the fabric of Virginia’s government.¹⁵

The fact that many things of a diverse nature are authorized or required to be done in the body of the act, though not expressed in its title is not objectionable, if what is authorized by the act is germane to the object expressed in the title, or has a legitimate and natural association therewith, or is congruous therewith, the title is sufficient.¹⁶

Decisions of the Virginia Supreme Court¹⁷ and a prior opinion of the Attorney General¹⁸ dictate a conclusion that raising taxes and fees and appropriating funds in an appropriation act is congruous or germane to the subject matter of the appropriation act.

CONCLUSION

Accordingly, it is my opinion that an appropriation act that appropriates money and raises funds by taxes or fees even without a separate, accompanying bill would not, therefore, violate the single object rule of the Virginia Constitution.

Furthermore, I recognize that this conclusion may be difficult to accept in light of the plain language of the Constitution. Nevertheless, I am constrained to follow the Virginia Supreme Court’s consistent interpretation of the single object rule in determining the scope of this provision.

¹ See *Commonwealth v. Brown*, 91 Va. 762, 21 S.E. 357 (1895).

² *Id.* at 771-72, 21 S.E. at 360 (citation omitted).

³ See 2010 H.B. 29, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+bud+A0-0> (prefiled bill).

⁴ See 2010 H.B. 30, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+bud+10-0> (prefiled bill).

⁵ See *Commonwealth v. Dodson*, 176 Va. 281, 11 S.E.2d 120 (1940).

⁶ *Id.* at 289, 11 S.E.2d at 123.

⁷ *Id.* at 303-04, 11 S.E.2d at 130.

⁸ *Id.* at 315, 11 S.E.2d at 135 (Hudgins, J., dissenting).

⁹ *Id.* at 316, 11 S.E.2d at 136 (Hudgins, J., dissenting) (emphasis added).

¹⁰ *Id.* at 310, 11 S.E.2d at 133.

¹¹ See 1983-1984 Op. Va. Att’y Gen. 66.

¹² *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 428-31, 657 S.E.2d 71, 76-77 (2008).

¹³ *Fairfax County Indus. Dev. Auth. v. Coyner*, 207 Va. 351, 355, 150 S.E.2d 87, 91-92 (1966).

¹⁴ *Id.* at 355, 150 S.E.2d at 92.

¹⁵ 1983-84 Op. Va. Att’y Gen., *supra* note 11, at 67.

¹⁶ *Narrows v. Bd. of Supvrs.*, 128 Va. 572, 582-83, 105 S.E. 82, 85 (1920).

¹⁷ See *supra* notes 1-2, 5-10, and 12-14 and accompanying text.

¹⁸ See *supra* notes 11 and 15 and accompanying text.

OP. NO. 10-082

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE

Expenditures of state revenues, including federal grants, require an appropriations act; once appropriated, the Governor may disburse such funds. The Governor may pledge to use his best efforts to secure a certain level of funding, but may not bind the General Assembly to provide specific future funding.

THE HONORABLE ROBERT G. MARSHALL
MEMBER, HOUSE OF DELEGATES
OCTOBER 1, 2010

ISSUES PRESENTED

You ask three interrelated questions concerning recently enacted federal legislation designed, in part, to maintain employment in the education field. You first inquire whether the Governor lawfully can enter into an agreement with the President of the United States, or his cabinet secretary, concerning a minimum level of funding for education. Second, you ask whether federal funds can be deposited in the State treasury and disbursed to localities without an Appropriations Act by the General Assembly. Finally, you ask whether the Governor can accept such funds when no appropriations act authorizes the receipt of such funds.

RESPONSE

It is my opinion that an appropriations act is required for the expenditure of revenues of the Commonwealth, including grant funds from the United States government. Where, as here, the General Assembly has provided for the appropriation of such funds, the Governor lawfully may disburse such funds. It is further my opinion that it is a factual question in this instance whether the Governor may provide the “assurance” required by federal law concerning 2011 spending, because the General Assembly has enacted the 2011 budget. Whether the Governor lawfully can accept such funding in the future by providing the required “assurance” of funding levels in subsequent years depends upon whether such a pledge represents a political commitment by the Governor or a legal pledge purporting to bind the General Assembly. The Governor may provide a political pledge to use his best efforts to secure a particular level of funding. The Governor may not, acting on his own, bind the General Assembly to provide future spending.

BACKGROUND

The United States Congress has enacted a measure designed to provide funds to assist states with their education programs.¹ The bill provides that “the Secretary shall not allocate funds to a State ... unless the Governor ... provides an assurance to the Secretary

that ... for State fiscal year 2011” the State will maintain education funding levels at not less than the level of support for education for “state fiscal year 2009.”²

APPLICABLE LAW AND DISCUSSION

The Constitution of Virginia contemplates an extensive role for the Governor in the budget process.³ Ultimate authority over the budget, however, is vested with the General Assembly. The Constitution provides that

[a]ll taxes, licenses, and other revenues of the Commonwealth shall be collected by its proper officers and paid into the State treasury. No money shall be paid out of the State treasury except in pursuance of appropriations made by law; and no such appropriation shall be made which is payable more than two years and six months after the end of the session of the General Assembly at which the law is enacted authorizing the same.^[4]

The Constitution further provides that “[n]o bill which . . . makes any appropriation of public . . . money . . . shall be passed except by the affirmative vote of a majority of all the members elected to each house, the name of each member voting and how he voted to be recorded in the journal.”⁵

Based on the plain language and historical application of the term “revenues,” funds granted by the United States to Virginia would constitute “revenues of the Commonwealth.”⁶ Therefore, grants received pursuant to this recent federal enactment must be the subject of an appropriation by the General Assembly.

The General Assembly historically has anticipated that certain funds unexpectedly may be received by the Commonwealth. The most recent budget bill specifies in § 4-104(a)(3) that “the Director, Department of Planning and Budget, is hereby authorized to increase the appropriations to any state agency by the amount of the proceeds of donations, gifts, grants or other non-general funds paid into the state treasury in excess of such appropriations during a fiscal year,” provided certain strictures are followed. Nothing prevents a state agency, in turn, from disbursing those monies to localities. One area expressly contemplated in the budget bill is “participation in a federal or sponsored program.”⁷ In this instance, the General Assembly of Virginia has made such an appropriation and, therefore, the Governor lawfully may accept and disburse the funds from the United States.

Finally, you inquire whether the Governor can provide the “assurance” the federal law requires. The federal enactment calls for the Governor to “provide[] an assurance to the Secretary” that for State fiscal year 2011 the State will preserve funding at 2009 levels.⁸ In this instance, the 2011 budget has been appropriated by the General Assembly. Therefore, it becomes a factual question whether the governor can provide the required assurance. For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, as opposed to matters interpreting questions of law.⁹

I note that, independently of the facts of this case, whether the Governor can provide an “assurance” of future funding levels depends upon what the assurance requires. The Governor cannot by making such an “assurance” bind the legislature, a separate branch of Government that is given ultimate authority over the budget. To the extent such an “assurance” constitutes a political rather than a legal pledge by the Governor to engage himself to make his best efforts to maintain education spending at a certain level, the Governor is free to make such a political commitment.

CONCLUSION

Accordingly, it is my opinion that an appropriations act is required for the expenditure of revenues of the Commonwealth, including grant funds from the United States government. Where, as here, the General Assembly has provided for the appropriation of such funds, the Governor lawfully may disburse such funds. It is further my opinion that it is a factual question in this instance whether the Governor may provide the “assurance” required by federal law concerning 2011 spending, because the General Assembly has enacted the 2011 budget. Whether the Governor lawfully can, in the future, provide an “assurance” of funding levels in subsequent years depends upon whether such a pledge represents a political commitment by the Governor or a legal pledge purporting to bind the General Assembly. The Governor may provide a political pledge to use his best efforts to secure a particular level of funding. The Governor may not, acting on his own, bind the General Assembly to provide future spending.

¹ FAA Air Transportation Modernization & Safety Improvement Act, Pub. L. No. 111-226, 124 Stat. 2389, § 101 (2010) (“Education Jobs Fund”).

² *Id.* at § 101(10)(a).

³ See VA. CONST. art. IV, § 6 (General Assembly to reconvene to consider Governor’s budgetary amendments); VA. CONST. ART. V, § 6(d) (providing the Governor with a line-item budgetary veto).

⁴ VA. CONST. art. X, § 7.

⁵ VA. CONST. art. IV, § 11.

⁶ I could not locate Virginia case law defining the term “revenues.” Cases from other states, however, support a broad conception of the term. See *Lance v. McGreevey*, 853 A.2d 856, 860 (N.J. 2004) (*per curiam*); *Comm. for Educ. Equal. v. Missouri*, 967 S.W.2d 62, 66 (Mo. 1998).

⁷ 2010 Va. Acts. ch. 872 § 4-104(a)(5). Although your inquiry is not directed at this aspect of the federal legislation, the bill also provides for additional federal funding with respect to Medicaid. See FAA Air Transp. Modernization & Safety Improvement Act, Pub. L. No. 111-226, 124 Stat. 2389, § 201. The General Assembly anticipated this contingency and provided for it in the budget. 2010 Va. Acts ch. 872, Item 297, ¶ KKKK.

⁸ Pub. L. No. 111-226, § 101(10)(a). Alternatively, if State tax collections in 2009 were less than fiscal year 2006, the statute uses an alternative measure for 2011 education expenditures. *Id.* at § 101(10)(a)(iii).

⁹ See 1996 Op. Va. Att’y Gen. 99, 100 (citing opinions).

OP. NO. 10-061

COUNTIES, CITIES AND TOWNS: FRANCHISES, PUBLIC PROPERTY, UTILITIES – ALTERNATIVE ONSITE SEWAGE SYSTEMS

A locality cannot require a special exception for the installation of privately-owned alternative onsite site sewage systems when the applicable statutory conditions are otherwise met.

THE HONORABLE STEPHEN H. MARTIN
MEMBER, SENATE OF VIRGINIA
DECEMBER 3, 2010

ISSUE PRESENTED

You ask whether § 15.2-2157(C) prevents a Virginia locality from requiring a developer to obtain a special exception to the local zoning ordinance in order to construct a privately-owned alternative onsite sewage system under the circumstances contemplated by that subsection.

RESPONSE

It is my opinion that a Virginia locality cannot require an owner to obtain a special exception to a local zoning ordinance in order to install an alternative onsite sewage system if the conditions set forth in § 15.2-2157(C) exist, namely that (i) there is no sewer or sewerage disposal facility available and (ii) the alternative onsite sewage system has been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.

BACKGROUND

Alternative onsite sewage systems, as well as conventional systems, are regulated by the Virginia Department of Health. Section 32.1-163 defines a conventional onsite sewage system as “a treatment works consisting of one or more septic tanks with gravity, pumped, or siphoned conveyance to a gravity distributed subsurface drainfield.” Conversely, § 32.1-163 defines an alternative onsite sewage system as, “a treatment works that is not a conventional onsite sewage system and does not result in a point source discharge.”¹ Alternative systems are often utilized due to soils being unsuitable for conventional septic systems, or if there are too many conventional septic systems in one area, or the systems are too close to groundwater or surface waters.²

Alternative systems use different treatment mediums such as sand, peat or plastic instead of soil to promote wastewater treatment. Some systems utilize wetlands, lagoons, aerators or disinfection devices for treatment. Float switches, pumps and other electrical or mechanical components are also used in alternative systems.³ According to the Virginia Department of Health, there is an increasing need for alternative septic systems as increasing residential growth pushes homeowners to find solutions for marginal soils and geology.⁴ The exponential growth in the value of buildable land is also prompting the increasing reliance on alternative systems.⁵

Your letter notes that a locality has adopted an ordinance that requires a developer of a subdivision to obtain a special exception to the local zoning ordinance in order to construct a privately-owned alternative sewage system under certain conditions. You question whether a locality may impose such a requirement.

APPLICABLE LAW AND DISCUSSION

Pursuant to § 15.2-2157, when sewers or sewerage disposal facilities are not available, a locality has the general authority to regulate, inspect, and require the installation and maintenance of onsite sewage systems in order to protect public health.⁶ A county or town also has the general authority to deny applications for onsite sewage systems when the locality has adopted a master plan for sewerage. Section 15.2-2128 provides:

Notwithstanding any other provision of *general law* relating to the approval of sewage systems, the governing body of any county or town which has adopted a master plan for a sewage system is authorized to deny an application for a sewage system if such denial appears to it to be in the best interest of the inhabitants of the county or town.^[7]

In 2009, the General Assembly amended § 15.2-2157 to add subsection (C) specifically to bar localities from prohibiting “the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health” in areas where sewers or sewerage disposal facilities are not available.⁸ The amendments to § 15.2-2157 further provided in subsection (D) that localities “shall not require maintenance standards and requirements for alternative onsite sewage systems that exceed those allowed under or established by the State Board of Health pursuant to § 32.1-164.”⁹

Construing §§ 15.2-2157 and 15.2-2128 together, the use of alternative onsite sewage systems cannot be prohibited where sewers or sewerage disposal facilities are not available regardless of whether a master sewage plan has been adopted. “[W]hen one statute speaks to a subject in a *general* way and another deals with a part of the same subject in a more *specific* manner, the two should be harmonized, if possible, and where they conflict, the latter prevails.”¹⁰

In your opinion request, you specifically refer to an ordinance enacted by a locality requiring a “special exception”¹¹ in order to construct a privately owned alternative septic system. Because the granting of a special exception is discretionary,¹² you note that it is possible for the locality to deny a developer’s application for an alternative onsite sewage system despite the system fulfilling the requirements of § 15.2-2157(C). Pursuant to that section, the special exception requirement may be valid only if a public sewer is available and offered to the individual seeking to install the alternative onsite sewage system. The locality retains the general authority pursuant to § 15.2-2157(A) and § 15.2-2128 to regulate, inspect, and deny applications for onsite sewage systems where a public sewer or sewerage facility is available; but § 15.2-2157(C) clearly states that when “sewers or sewerage disposal systems are not available, a locality shall not prohibit the use of alternative onsite sewage systems....” To require a special exception application for an alternative onsite sewer system that meets the conditions set forth in § 15.2-2157(C) effectively would give the local governing body the option to prohibit the system, a result

not permitted by that subsection.

Further, § 15.2-2157(D) prohibits a locality from establishing maintenance standards and requirements for alternative onsite systems that exceed those established by the Virginia Department of Health.¹³ Therefore, if the “special exception” places standards or requirements on alternative systems that are more restrictive than those prescribed by the Virginia Department of Health, the ordinance would exceed the scope of the authority granted to localities pursuant to § 15.2-2157(D). The Commonwealth follows the Dillon Rule, which “provides that ‘municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.’”¹⁴ Thus, “[w]hen a local ordinance exceeds the scope of this authority, the ordinance is invalid.”¹⁵

CONCLUSION

Accordingly, it is my opinion that a Virginia locality cannot require an owner to obtain a special exception to a local zoning ordinance in order to install an alternative onsite sewage system if the conditions set forth in § 15.2-2157(C) exist, namely that (i) there is no sewer or sewerage disposal facility available and (ii) the alternative onsite sewage system has been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.¹⁶

¹ VA. CODE ANN. § 32.1-163 (2009).

² See ENVIRONMENTAL PROTECTION AGENCY, A HOMEOWNER’S GUIDE TO SEPTIC SYSTEMS 3 (2002, rev. 2006), available at http://www.epa.gov/owm/septic/pubs/homeowner_guide_long.pdf.

³ *Id.* at 4.

⁴ See E.L. HAMM & ASSOCS., INC., VDH RE-ENGINEERING INITIATIVE, ONSITE SEWAGE SYSTEM PROGRAM 1 (2006), available at: http://www.vdh.virginia.gov/EnvironmentalHealth/Onsite/newssofinterest/documents/VDH%20Reengineering%20Initiative_final_5.06.pdf

⁵ *Id.*

⁶ VA. CODE ANN. § 15.2-2157(A) (Supp. 2010) (“Any locality may require the installation, maintenance and operation of, regulate and inspect onsite sewage systems or other means of disposing of sewage when sewers or sewerage disposal facilities are not available; without liability to the owner thereof, may prevent the maintenance and operation of onsite sewage systems or such other means of disposing of sewage when they contribute or are likely to contribute to the pollution of public or private water supplies or the contraction or spread of infectious, contagious and dangerous diseases; and may regulate and inspect the disposal of human excreta”). See also § 15.2-2126 (2008) (requiring notice for the establishment or extension of sewer systems to serve three or more connections) and § 15.2-2127 (2008) (authorizing localities to disapprove sewage systems if the locality finds for certain reasons that the sewage system is not capable of serving the proposed number of connections).

⁷ Section 15.2-2128 (2008) (emphasis added).

⁸ 2009 Va. Acts chs. 786, 846. VA. CODE ANN. § 15.2-2157(C)-(D).

⁹ *Id.* The State Board of Health enacted emergency regulations, effective April 7, 2010, for alternative onsite sewage systems pursuant to the enactment language of the 2009 amendments to § 32.1-163.6. 2009 Va. Acts ch. 220. See 2009 Op. Va. Att’y Gen. 3 (concluding that adoption by Board of Health of emergency regulations will trigger applicability of § 15.2-2157(C)-(D) upon the effective date of such regulations). The regulations prescribe certain requirements for alternative onsite sewage systems depending upon the designer of the system.

See 12 VA. ADMIN. CODE §§ 5-613-40 through 5-613-110. Requirements imposed by localities that are more stringent than those listed in the regulations are prohibited by § 15.2-2157(D).

¹⁰ *Thomas v. Commonwealth*, 244 Va. 1, 22-23, 419 S.E.2d 606, 618 (1992) (quoting *Va. Nat'l Bank v. Harris*, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979)) (emphasis added). See also *Phipps v. Liddle*, 267 Va. 344, 346, 593 S.E.2d 193, 195 (2004) (“If possible, we must harmonize apparently conflicting statutes to give effect to both.”); *Kirkpatrick v. Bd. of Suprvs.*, 146 Va. 113, 125, 136 S.E. 186, 190 (1926) (“[W]here two statutes are in apparent conflict they should be construed, if reasonably possible, so as to allow both to stand and to give force and effect to each.”); *Ainslie v. Inman*, 265 Va. 347, 353, 577 S.E.2d. 246, 249 (2003) (“[W]hen a given controversy involves a number of related statutes, they should be read and construed together in order to give full meaning, force, and effect to each.”); *Ragan v. Woodcroft Village Apts.*, 255 Va. 322, 325, 497 S.E.2d 740, 742 (1998) (“We accord each statute, insofar as possible, a meaning that does not conflict with any other statute.”).

¹¹ The term “special exception” refers to “the delegated power of the state to set aside certain categories of uses which are to be permitted only after being submitted to governmental scrutiny in each case, in order to insure compliance with standards designed to protect neighboring properties and the public.” *Bd. of Suprvs. v. Southland Corp.*, 224 Va. 514, 521, 297 S.E.2d 718, 721-22 (1982).

¹² “Whether a legislative body has reserved unto itself the power to grant or deny special exceptions or use permits, or has delegated the power to a Board of Zoning Appeals, [the Supreme Court of Virginia has] consistently held the exercise of that power to be a legislative, rather than administrative act.” *Id.*, 224 Va. at 522, 297 S.E.2d at 722. Such a legislative act “involves ... balancing ... the consequences of private conduct against the interests of public welfare, health and safety[.]” *Id.*

¹³ Section 15.2-2157(D), unlike subsection (C), does not contain the language, “[w]hen sewers or sewerage disposal facilities are not available.” Therefore, it is presumed that the General Assembly intended for subsection (D) to apply whether or not a sewer or sewerage disposal system were available. See *Logan v. City Council*, 275 Va. 483, 492, 659 S.E.2d 296, 301 (2008) (“We determine the General Assembly’s intent from the words employed in the statutes.”); see also *City of Richmond v. Confre Club of Richmond*, 239 Va. 77, 80, 387 S.E.2d 471, 473 (1990) (“Legislative intent is determined from the plain meaning of the words used.”).

¹⁴ *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010) (quoting *Bd. of Zoning Appeals v. Bd. of Suprvs.*, 276 Va. 550, 553-54, 666 S.E.2d 315, 317 (2008)); accord *Bd. of Suprvs. v. Countryside Inv. Co.*, 258 Va. 497, 502-05, 522 S.E.2d 610, 612-14 (1999); *City of Chesapeake v. Gardner Enters., Inc.*, 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997).

¹⁵ *City of Chesapeake*, 253 Va. at 246, 482 S.E.2d at 814; see also *Bd. of Suprvs. v. Reed’s Landing Corp.*, 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995) (“If there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body.”).

¹⁶ A Virginia locality still may require that plans for an alternative onsite sewage system be submitted as part of its site plan review process to ensure that the necessary technical requirements have been met. See § 15.2-2286(A)(8) (Supp. 2010). Any such review, however, must not impose requirements that exceed those established for such systems in regulations of the State Board of Health. See § 15.2-2157(D). Nor may the effect of any such review be to prohibit an alternative onsite sewage system when the conditions set forth in § 15.2-2157(C) exist.

OP. NO. 09-098

COUNTIES, CITIES AND TOWNS: FRANCHISES, PUBLIC PROPERTY, UTILITIES – STORMWATER CONTROL PROGRAM

Based on facts presented, stormwater fee in § 26-401 of Chesapeake City Code is service fee, rather than tax; United States Navy is not constitutionally exempt from paying fee.

RONALD S. HALLMAN, ESQ.
CHESAPEAKE CITY ATTORNEY
MARCH 4, 2010

ISSUE PRESENTED

You ask whether the stormwater fee set forth in § 26-401 of the Chesapeake City Code is permissible under § 15.2-2114 of the *Virginia Code* or constitutes an impermissible tax on the United States, which would exempt the United States Navy from paying the fee.

RESPONSE

Based on the facts you present, it is my opinion that the stormwater fee set forth in § 26-401 of the Chesapeake City Code is a service fee rather than a tax, and the United States Navy is not constitutionally exempt from paying the fee.

BACKGROUND

To better regulate pollution conveyed by stormwater runoff, Congress enacted § 1342(p) of the Clean Water Act, which established the National Pollutant Discharge Elimination System (NPDES) Permit program. Section 1342(p) of the Act requires certain municipalities to obtain a NPDES permit to reduce the discharge of pollutants in stormwater runoff. You advise that federal law mandates that localities control the water quality impact of stormwater discharges. In compliance with this mandate, you note that the city of Chesapeake (“City”) has obtained a NPDES permit for its municipal drainage system. To recoup costs associated with this program, the City has established a “utility” that charges a stormwater management fee pursuant to § 15.2-2114 of the *Virginia Code*.

You relate that the fee is structured to ensure that the amount charged to particular properties is proportional to the properties’ contribution to stormwater runoff. Undeveloped parcels are not charged a fee. The fee for developed parcels is based on Equivalent Residential Units (ERUs), which are the average impervious area of all residential dwelling units, approximately 2,112 square feet. Each owner is charged based on the number of ERUs on each parcel. Residential parcels are charged one ERU, and nonresidential parcels are charged a fee based on the number of ERUs represented by their total impervious area. You explain that nonresidential parcels typically are charged a higher fee than residential parcels because the nonresidential parcels have a greater impact on the stormwater system.

You relate that the United States Navy (“Navy”) has refused to pay stormwater fees claiming that the City’s fee structure is a tax-like assessment. Prior to 2007, you advise that the Navy paid the City’s stormwater fee without question or complaint. You observe that typically only those federal facilities that have obtained the required NPDES permit from the Virginia Department of Conservation and Recreation and that discharge stormwater runoff directly into waters of the United States are exempt from municipal stormwater fees. You conclude that because the Navy properties located within the City discharge stormwater into the City’s stormwater system, and not directly into United States waters, the Navy is not exempt from this fee.² You advise that the fee is not a tax because it mirrors the exact requirements contained in § 15.2-2114. Further, you advise

that the fee is nondiscriminatory, is reasonable, is proportionate to the benefit conferred, and produces revenues that do not exceed the cost of the program. Therefore, you conclude that the stormwater fee is a valid service charge under § 15.2-2114 and not an impermissible tax.³

APPLICABLE LAW AND DISCUSSION

The traditional role of this Office regarding requested opinions has been to interpret applicable statutes to the extent possible utilizing the pertinent rules of statutory construction and general application of statutory provisions. Attorneys General have a longstanding policy of responding to official opinion requests only⁴ when such requests concern an interpretation of federal or state law, rule, or regulation. In instances when a request: (1) involves application of facts to the law, and does not involve a question of law; (2) requires the interpretation of a matter reserved to another entity; (3) involves a matter currently in litigation; and (4) involves a matter of purely local concern or procedure, this Office traditionally has declined to render an opinion.⁵ Accordingly, I limit my comments to the interpretation of § 26-401 of the Chesapeake City Code (“City Code”) as authorized by § 15.2-2114. Further, the analysis in this opinion is based entirely upon the facts that you provide. I refrain from commenting on matters that would require additional facts or the application of facts to the appropriate provisions of law.

In § 15.2-2114(A), the General Assembly permits any locality to adopt a stormwater control program consistent with Article 1.1, Chapter 6 of Title 10.1 by establishing a utility or enacting a system of service charges. Pursuant to § 15.2-2114, the City adopted a stormwater management fee ordinance.⁶ The key question is whether this fee truly is a user fee or service charge or whether it is an impermissible tax disguised as a fee.

One of the oldest constitutional principles is that a state may not tax the United States.⁷ Consequently, the City, a political subdivision of the Commonwealth, may not tax the Navy. Although local governments may not tax the United States, they may charge the federal government user fees for services provided by the locality. Such a fee, however, must clearly be a fee, not a tax disguised as a fee. The United States Fourth Circuit Court of Appeals has explained that “[u]ser fees are payments made in return for a government-provided benefit. Taxes, on the other hand, are ‘enforced contribution[s] for the support of government.’”⁸

The fees imposed by the City are akin to fees for sewage. The City is processing stormwater runoff that emanates from the naval facility. The Supreme Court of the United States has held that if a fee (1) does not discriminate against the federal government, (2) is a fair approximation of use by the federal government, and (3) is structured to produce revenues that will not exceed the total costs of benefits supplied, then the federal government cannot assert its sovereign immunity from taxes.⁹ First, it is clear from the facts provided that the City’s stormwater fee does not discriminate against the federal government. The Navy is assessed with a fee based on ERUs, the same as the fee assessed to other nonresidential properties. The fee per ERU is set, and the owner is charged with the fee based on the number of ERUs. Under the City’s fee scheme, residential properties are charged a lesser fee because they are judged to have less impact

on the stormwater system. Because the Navy is charged the same fee as other nonresidential properties, there is no discrimination against the federal government.

Second, the fee represents a “fair approximation” of the use by the particular lot. Of course, it is impossible to install a meter to measure the stormwater runoff for a particular parcel of land. You relate, however, that each lot is assessed based on the ERU, which is then multiplied by an impervious area calculation. This level of precision satisfies the “fair approximation” test. The United States Supreme Court has provided guidance concerning the meaning of “fair approximation.”¹⁰ The Court analyzed a fee that was a flat registration tax for all civil aircraft, which was introduced to help finance federal aviation programs.¹¹ The amount of the fee was based on the size and type of aircraft,¹² but not the aircraft’s actual use of the airways or the facilities and services supplied by the United States.¹³ Similarly here, even if the service charges do not correlate exactly with the stormwater flowing from the naval property at issue, that does not render the service charge an impermissible tax. As the United States Court of Appeals for the First Circuit has noted, “the law does not require a precise correlation between regulatory fees collected and regulatory services provided.”¹⁴ The fee at issue represents a constitutionally permissible “fair approximation” of the use by the naval facility.¹⁵

The fees are structured to produce revenues that will not exceed the total costs of benefits supplied. You note that the fees, charges and other revenue collected for stormwater runoff are dedicated to special revenue and used only to finance the stormwater program. Therefore, “[t]he fees are not designed simply to raise money for general revenue purposes.”¹⁶ Instead, they represent “a ‘classic “regulatory” fee ... imposed by an agency upon those subject to its regulation,’ and used, for example, to ‘raise money placed in a special fund to help defray the agency’s regulation-related expenses.’”¹⁷

Finally, I note that in the Clean Water Act, Congress has waived any immunity of the federal government with respect to “reasonable service charges” that arise in connection with activities that result “in the discharge or runoff of pollutants.”¹⁸

CONCLUSION

Accordingly, based on the facts you present, it is my opinion that the stormwater fee set forth in § 26-401 of the Chesapeake City Code is a service fee rather than a tax, and the United States Navy is not constitutionally exempt from paying the fee.

¹ *Id.*

² Section 2.2-505(B) requires that an opinion request from a county attorney “shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney’s legal conclusions.”

³ *Id.*

⁴ *See* Op. Va. Att’y Gen.: 1998 at 71, 72; 1997 at 105, 107; 1991 at 237, 238; 1989 at 288, 293 n.1; 1986-87 at 347, 348; 1977-78 at 31, 33; 1976-77 at 17, 17.

⁵ The authority of the Office of the Attorney General to issue advisory opinion is limited to questions that are legal in nature. *See, e.g.,* Op. Va. Att’y Gen.: 2008 at 141, 144 n.14; 2006 at 95, 97; 2002 at 144, 147; 1999 at 215, 217; 1997 at 195, 196; 1996 at 207, 208; 1991 at 122, 124; 1982-1983 at 100, 101 n.3; 1977-1978 at 31, 33; 1976-1977 at 17, 17.

⁶ Section 26-401 of the Chesapeake City Code, titled “[s]tormwater utility fees,” provides that:

“(a) The city council, by this article, shall set appropriate levels of utility fees so that sufficient revenues will be generated to provide for a balanced budget for the stormwater management system. Effective after approval of this article, utility fees shall be charged to owners of all developed property in the city.

“(b) For the purpose of determining the utility fee, all properties in the city shall be classified by the director into one of the following categories:

“(1) Residential;

“(2) Nonresidential; and

“(3) Undeveloped property.

“(c) The monthly utility fee for residential shall be the ERU [Equivalent Residential Unit] rate of \$4.45 per month for one ERU for the year of 2007, \$6.35 per month for one ERU for the year of 2008, and increased by an additional \$0.50 per month for one ERU for every year thereafter until further consideration by City Council.

“(d) The monthly utility fee for nonresidential shall be the ERU rate of \$4.45 per month for one ERU for the year of 2007, \$6.35 per month for one ERU for the year of 2008, and increased by an additional \$0.50 per month for one ERU for every year thereafter until further consideration by City Council, multiplied by the numerical factor obtained by dividing the total impervious area of a nonresidential property by one ERU (2,112 square feet). The director shall determine impervious area considering data supplied by the real estate assessor, other city staff and/or the property owner. The assessed utility fee shall be updated by the director based on any change in impervious area. The minimum utility fee for any nonresidential property shall be equal to one ERU rate.

“(e) The utility fee for vacant developed property, both residential and nonresidential, shall be the same as that for occupied property of the same class.

“(f) Undeveloped property shall be exempt from the utility fee.”

http://library1.municode.com/default-test/home.htm?infobase=10529&doc_action=whatsnew.

⁷See U.S. CONST. art. VI, cl. 2; see also *United States v. County of Allegheny*, 322 U.S. 174, 177 (1944) (noting that state or local governmental body may not tax federal entity in absence of congressional consent); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436-37 (1819) (declaring that Maryland could not tax Bank of the United States; such tax was unconstitutional and void).

⁸*United States v. City of Huntington*, 999 F.2d 71, 74 (4th Cir. 1993) (citation omitted) (second alteration in original).

⁹*Massachusetts v. United States*, 435 U.S. 444 (1978).

¹⁰*Id.* at 467-70.

¹¹*Id.* at 446, 449-50.

¹²*Id.* at 450.

¹³*Id.* at 463. The Court also acknowledged that a fee based on actual use would measure the benefit to the user more accurately. The Court emphasized, however, that an actual use measurement method would be more costly to administer. *Id.* at 468-69.

¹⁴*Maine v. Dep’t of Navy*, 973 F.2d 1007, 1014 (1st Cir. 1992) (upholding Hazardous Waste Fund as reasonable fee rather than impermissible tax).

¹⁵See *N.Y. State Dep’t of Envtl. Conserv. v. United States Dep’t of Energy*, 850 F. Supp. 132, 139-43 (N.D.N.Y. 1994) (upholding waste water facility fees imposed by New York on United States), *aff’d sub nom.*, *Jorling v. United States Dep’t of Energy*, 218 F.3d 96 (2d Cir. 2000); but see *Cincinnati v. United States*, 39 Fed. Cl. 271 (1997) (invalidating storm water drainage fee as an impermissible tax), *aff’d on other grounds* 153 F.3d 1375 (Fed. Cir. 1998).

¹⁶*Maine*, 973 F.2d at 1012.

¹⁷*Id.* (citations omitted) (alteration in original).

¹⁸33 U.S.C.S. § 1323(a) (LexisNexis 2001).

OP. NO. 10-045

COUNTIES, CITIES AND TOWNS: FRANCHISES, PUBLIC PROPERTY, UTILITIES – STORMWATER CONTROL PROGRAM

Storm water control charges are service fees, not taxes. Land owners are not responsible for runoff that is caused by drainage from other properties. Properties with conditions established prior to adoption of ordinance regulating stormwater cannot be “grandfathered;” localities have no authority to exempt properties with unique characteristics that do not permit mitigation. Localities may assert a lien against real estate to enforce unpaid charges and interest.

THE HONORABLE RICHARD P. BELL
MEMBER, HOUSE OF DELEGATES
JULY 28, 2010

ISSUES PRESENTED

You ask several questions, as follows, concerning local ordinances adopted to establish stormwater control programs pursuant to § 15.2-2114 of the Virginia Code: 1) whether the authorized service charges constitute a tax; 2) whether the enforcement provisions are enforceable; 3) whether recent legislation delays that enforcement; 4) whether certain properties may be grandfathered or exempted; and finally, 5) whether landowners are liable for run-off from their property that is created by drainage originating elsewhere.

RESPONSE

It is my opinion that the utility or service charge authorized by § 15.2-2114 is a fee, not a tax, that is enforceable by localities pursuant to § 15.2-2114(D) and that Senate Bill 395 does not affect localities’ ability to enforce existing stormwater control programs. It further is my opinion that § 15.2-2114 neither provides for the grandfathering of properties, nor does it provide an exemption for landowners who own property with characteristics that make runoff mitigation infeasible. Finally, a landowner cannot be held responsible for reducing or paying a charge for runoff from his property caused by drainage from other properties.

BACKGROUND

You report that the City of Staunton has adopted an ordinance establishing a stormwater control program pursuant to § 15.2-2114.¹ You also note that, during its 2010 session, the General Assembly adopted Senate Bill 395, which delays the effective date of the regulation that will establish the procedures by which the Department of Conservation and Recreation delegates authority for stormwater management programs to localities and the water quality and quantity criteria to be enforced by such programs, as well as the criteria by which such programs will be evaluated.²

APPLICABLE LAW AND DISCUSSION

You first inquire whether the utility or service charge authorized by § 15.2-2114 is a tax. The language of the statute indicates that it is a fee, not a tax.³ Not only is it called a

“service charge” rather than a tax, but § 15.2-2114(B) requires that the charges must be based on properties’ contributions to stormwater runoff, and that the income derived from service charges may not exceed the actual costs incurred by a locality in operating a stormwater control program. As expressed in a recent Opinion of this office, because these charges are structured to produce only sufficient revenue to cover the costs of operating a stormwater control program, such a stormwater control charge assessed by the City of Chesapeake pursuant to § 15.2-2114 is a service fee, not a tax.⁴

You next ask whether the enforcement provisions of § 15.2-2114(D), which are consistent with tax lien enforcement, can be applied to a utility charge. The Code permits localities to assert a lien against real property for nonpayment of charges or fees in numerous instances.⁵ In this case, § 15.2-2114 explicitly grants localities authority to impose stormwater control program charges, to file suit to recover unpaid charges and interest, and to assert a lien against real property for the unpaid charges and interest.⁶ Because the General Assembly has expressly authorized localities to use this approach, the provisions set forth in § 15.2-2114 are enforceable.

You further inquire whether the passage of Senate Bill 395 delays these enforcement measures until the new stormwater management regulations take effect. Localities adopt stormwater control programs pursuant to § 15.2-2114 to meet the requirements of the Virginia stormwater management regulations.⁷ These regulations currently are in effect. Senate Bill 395 simply delayed the effective date of *new* regulations that will replace portions of the existing regulations.⁸ As such, those localities that have adopted stormwater control programs pursuant to § 15.2-2114 may continue to administer and enforce those programs, but will need to satisfy the new regulations when they take effect.

You also ask whether a property with conditions predating the adoption of an ordinance establishing a stormwater control program is “grandfathered”⁹ and thus exempt from payment of the charge and whether a landowner who has property with unique characteristics is exempt from the ordinance requirements when the runoff from the property cannot be mitigated.¹⁰ The Dillon Rule dictates that, “municipal corporations have only those powers expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”¹¹ Section 15.2-2114 does not provide for “grandfathering” of properties. Therefore, the General Assembly has not shown an intention to exempt properties with conditions predating local stormwater control ordinances from the requirements of such ordinances, including the service charge. I am not aware of any basis, absent express legislation, upon which such properties may be “grandfathered.”¹² Similarly, the Code does not authorize local governments to exempt from the charge a landowner who is unable to mitigate runoff and pollutants and thereby obtain a waiver. The General Assembly has expressly authorized localities to waive fees when certain conditions are met, but it has not provided similar authorization for a locality to exempt owners of properties for which stormwater flow and pollutants cannot be reduced.

Your final inquiry is whether a landowner can be held responsible for reducing or paying a charge for runoff from his property caused by drainage coming onto his property from

other properties or public streets. Section 15.2-2114(B) requires that stormwater charges assessed to property owners “be based upon their contributions to stormwater runoff.”¹³ Runoff draining onto a property from other sources, therefore, does not constitute that property’s “contribution” to stormwater runoff, and as such, the landowner is not liable. The ordinance adopted by the City of Staunton serves as an illustration: it provides that the stormwater control program fee is to be based on a property’s square footage of impervious area.¹⁴ Such a fee makes the property owner responsible only for runoff attributed to his property’s impervious areas while meeting the requirement of § 15.2-2114(B) that the charge be based on a property’s contribution to stormwater runoff.

CONCLUSION

Accordingly, it is my opinion that the utility or service charge authorized by § 15.2-2114 is a fee, not a tax, that is enforceable by localities pursuant to § 15.2-2114(D). It is further my opinion that Senate Bill 395 does not affect localities’ ability to enforce existing stormwater control programs adopted pursuant to § 15.2-2114. Additionally, it is my opinion that § 15.2-2114 does not provide for the grandfathering of properties with conditions that predated the passage of local ordinances, nor does it provide an exemption for landowners whose properties have unique characteristics that prevent the reduction of stormwater runoff. Finally, I conclude that a landowner cannot be held responsible for reducing runoff or paying a charge for runoff from his property when that runoff is caused by drainage from other properties.

¹ See CITY OF STAUNTON, VA., Code § 13.05 (Code Publishing Co. 2010), *available at* <http://www.codepublishing.com/VA/staunton.html>.

² The bill extends the effective date of the regulations to “within 280 days after the establishment by the United States Environmental Protection Agency of a Chesapeake Bay-wide Total Maximum Daily Load (TMDL) but in any event no later than December 1, 2011.” 2010 Va. Acts ch. 370.

³ VA. CODE ANN. § 15.2-2114 (2008 & Supp. 2010).

⁴ See 2010 Op. Va. Att’y Gen. No. 09-098, *available at* <http://www.vaag.com/OPINIONS/2010opns/09-098-Hallman.pdf>.

⁵ See, e.g., VA. CODE ANN. § 15.2-901 (locality may assert lien for unpaid charges for removal of trash, garbage, refuse, litter and other substances which might endanger the health or safety of residents); § 15.2-2119 (locality may assert lien for unpaid fees and charges for sewer services); § 15.2-1115 (locality may assert lien for charges for abatement or removal of nuisances).

⁶ Section 15.2-2114(D).

⁷ 4 VA. ADMIN. CODE § 50-60.

⁸ See note 2, *supra*.

⁹ “The term ‘grandfathering’ simply is a matter of legislative grace where the governing body, by ordinance or other legitimate formal policy, carves out a legislative exception to the general application of regulations for a particular provision.” 2009 Op. Va. Att’y Gen. 30, 31, citing *County of Fairfax v. Fleet Indus. Park Ltd. P’ship*, 242 Va. 426, 431, 410 S.E.2d 669, 672 (1991).

¹⁰ When you refer to mitigation, I believe you are referring to the provision in § 15.2-2114(B) that allows localities to fully or partially waive charges for landowners who take certain steps to reduce runoff and pollutants from their properties; see § 15.2-2114(B).

¹¹ *Bd. of Supvrs. v. Countryside Investment Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999) (quoting *Chesapeake v. Gardner Enters.*, 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997)); *accord* *Commonwealth v. County Bd.*, 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977); *Bd. of Supvrs. v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975); *City of Richmond v. Bd. of Supvrs.*, 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958); 2008 Op.

Va. Atty. Gen. 37, 38. Furthermore, any doubt as to the existence of such power must be resolved against the locality; *see* City of Richmond v. Bd. of Supvrs., 199 Va. at 684, 101 S.E.2d at 645; 2009 Op. Va. Atty. Gen. 41.

¹² For a similar analysis of whether “grandfathering” is allowed absent express statutory authorization, *see* 2004 Op. Va. Att’y Gen. 146.

¹³ Section 15.2-2114(B).

¹⁴ *See* CITY OF STAUNTON, VA., Code § 13.05.055(2) (Code Publishing Co. 2010).

OP. NO. 10-024

COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENT – CHARITABLE DONATIONS

A town may enact an ordinance exempting a charitable organization from the payment of utility charges.

MICHAEL F. MCCLELLAN CARRICO, ESQUIRE
TOWN ATTORNEY FOR THE TOWN OF GATE CITY
OCTOBER 29, 2010

ISSUE PRESENTED

You inquire whether it is lawful for a municipality to enact an ordinance exempting a nonprofit organization from all charges on utilities (e.g., water, sewer, garbage collection) provided by the municipality as a charitable donation of money or in-kind services to that nonprofit organization pursuant to § 15.2-953.

RESPONSE

It is my opinion that the Town may enact an ordinance exempting a charitable institution or association from the payment of utility charges as a donation of money or in-kind services pursuant to that provision.

BACKGROUND

You relate that the Town of Gate City provides fee-based utility services of water, sewer and garbage collection to its residents. You also state that the Gate City Town Council on August 20, 1996, approved a motion to provide free water, sewer and garbage collection services to a property within the Gate City town limits that is operated by a nonprofit organization that provides essential services to battered women. Since the approval of this ordinance in 1996, the organization has enjoyed an exemption from all charges on utilities provided by the Town of Gate City.

APPLICABLE LAW AND DISCUSSION

Under the Dillon Rule, localities have only those powers that the General Assembly grants them.¹ Towns, in particular, have all the powers conferred upon them by their charters and those set forth in §§ 15.2-1100 through 15.2-1133.² Section 15.2-1102 authorizes towns to exercise all necessary “powers pertinent to the conduct of the affairs

and functions of the municipal government, the exercise of which is not expressly prohibited by the Constitution and the general laws of the Commonwealth.”

The Constitution of Virginia provides that the General Assembly may “authorize counties, cities, or towns to make ... appropriations to any charitable institution or association.”³ Section 15.2-953(A) of the *Code of Virginia* implements this constitutional provision and authorizes localities to make “appropriations of public funds, of personal property or of any real estate and donations” to “any charitable institution or association, located within their respective limits or outside their limits if such institution or association provides services to residents of the locality; however, such institution or association shall not be controlled in whole or in part by any church or sectarian society.”⁴

A 2002 opinion of the Attorney General previously concluded that a town may not contribute or donate in-kind resources to a nonprofit organization pursuant to the authority granted in § 15.2-953(A).⁵ Subsequently, the General Assembly in 2007 amended § 15.2-953, inserting “and donations” in subsection A and adding what is now subsection E to provide that for purposes of this section, “‘donations’ shall include the lawful provision of in-kind resources for any event sponsored by the donee.”⁶

Section 15.2-953(A) expressly authorizes localities to make appropriations to charitable entities of “public funds, of personal property or of any real estate and donations.” The term “donation” should be construed according to its plain language.⁷ A donation simply means “a gift.”⁸ The General Assembly has not limited its definition of the term “donation.” Therefore, although the statute does not specifically reference providing utility services without charge to properties maintained by such nonprofit entities, there is no reason donations of utility services should be excluded from the scope of donations that may be made.⁹

Appropriations of funds must be made only on an annual, semi-annual, quarterly, or monthly basis,¹⁰ prompting the locality to periodically review the issue. A donation that consists of an exemption of utility charges is not subject to the same requirement of periodic re-appropriation. Consequently, an ordinance that simply exempts a non-profit organization from payment of utility charges on a permanent basis is less transparent and reduces accountability compared the procedures required for an appropriation of money. The plain language of the statute, however, authorizes a locality to make such donations.¹¹

CONCLUSION

Accordingly, it is my opinion that municipalities may enact an ordinance exempting a charitable organization or association from the payment of utility charges as a donation pursuant to § 15.2-953.

¹ See *Commonwealth v. Arlington County Bd.*, 217 Va. 558, 573-75, 232 S.E.2d 30, 40-41 (1977) (“[T]he Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end.”).

² See VA. CODE ANN. §§ 15.2-204; 15.2-1102; 15.2-1103 (2008).

³ VA. CONST. art. IV, § 16.

⁴ Section 15.2-953(A) (Supp. 2010).

⁵ See 2002 Op. Va. Att’y Gen. 70 (the express language of § 15.2-953(A) did not contemplate the contribution of the in-kind services described, *i.e.*, a town council’s decision to direct town employees to assist in the setup for an annual festival held by the local business and civic association).

⁶ 2007 Va. Acts ch. 292.

⁷ See 2002 Op. Va. Att’y Gen. 214 (“in the absence of a statutory definition, a term should be given its plain and ordinary meaning”).

⁸ MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 344 (10th ed. 1993).

⁹ A nonprofit organization’s ongoing operation of a property would not constitute an “event” to which a municipality may make a donation of in-kind resources. The word “event” is not defined in the statute and, thus, should be given its plain and ordinary meaning. See 2002 Op. Va. Att’y Gen. 214 (“in the absence of a statutory definition, a term should be given its plain and ordinary meaning”). See also MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 401 (10th ed. 1993) (defining “event” as “a social occasion or activity”).

¹⁰ See § 15.2-2506 (Supp. 2010) (“No money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the governing body”).

¹¹ If the charitable institution ceases to qualify under § 15.2-953, for example because it no longer provides services in the locality making the donation of in-kind services, the locality would be precluded from continuing to make the in-kind donation.

OP. NO. 10-072

COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENT – WASTE AND RECYCLING

Localities have the authority to require residents to join the public trash collection service.

THE HONORABLE BARBARA J. COMSTOCK
MEMBER, HOUSE OF DELEGATES
AUGUST 12, 2010

ISSUE PRESENTED

You inquire whether Fairfax County has the authority to require residents who are currently using a private trash collection service to join the county trash collection service.

RESPONSE

It is my opinion that the county may require residents to give up their private trash collection service and join the service provided by the county provided that the statutory notice, hearing and waiting period requirements are met, or 55 percent of the affected property owners petition the governing body to take over the collection service. I further conclude that a county may, but is not required to, allow residents to opt out of the public trash collection service and maintain a parallel private collection service.

BACKGROUND

You relate that Fairfax County plans to create new sanitary districts that would provide mandatory county trash collection in McLean. Currently, a group of local citizens manages its garbage disposal through a nonprofit corporation that employs a county-licensed private trash company. You indicate that the county service would supplant this service and that the county would add a service charge to these residents' real estate property tax bills. You further note that county officials have provided mixed responses about whether residents would be able to opt out of the county's refuse collection service. Finally, you report that many of the affected citizens are opposed to the county's plan.

APPLICABLE LAW AND DISCUSSION

Section 15.2-901 of the *Code of Virginia* grants localities the authority to require property owners to remove from their property "all trash, refuse, litter and other substances which might endanger the health or safety of other residents."¹ The contours of that authority are governed by §§ 15.2-927 through 15.2-939.

The General Assembly has provided that "it has been and is continuing to be the policy of the Commonwealth to authorize each locality to *displace* or limit competition in the area of garbage, trash or refuse collection services"² and stated that "governing bodies are directed and authorized to exercise all powers regarding garbage, trash, and refuse collection . . . notwithstanding any anti-competitive effect."³ The Code defines "displace" to "mean a locality's . . . provision of a service which prohibits a private company from providing the same service and which the company is providing at the time the decision to displace is made."⁴ Although the law does not explicitly authorize localities to mandate use of its trash collection over that of another provider, the language of these statutes clearly establishes that authority. I therefore conclude that the county may require its residents to join the trash collection service it provides.⁵

The Code sets forth certain requirements the locality must satisfy before it exercises this authority. First, the county must hold at least one public hearing seeking comment on the advisability of the locality providing such service, and the county must provide notice of that hearing to the public and to all identifiable private companies that provide the service in its jurisdiction.⁶ Second, the governing body must make a written finding of at least one of the following: 1) adequate privately-owned collection services are unavailable; 2) the use of privately-owned and operated services has created a nuisance or has endangered public health; 3) available privately-owned services cannot provide the needed services in a reasonable and cost-efficient manner; or 4) displacement is necessary to develop or operate a regional refuse collection system.⁷ After making the requisite finding, the county then has one year to take the measures necessary for it to provide the service.⁸ Finally, before providing the service, the locality must either provide five years' notice to the displaced private company, or pay the company an amount equal to its previous 12-month's gross receipts from providing the service to the displacement area.⁹

In addition, a county may assume exclusive control over trash collection when "at least 55% of the property owners in the displacement area petition the governing body to take

over such collection service.”¹⁰ It therefore is my opinion that a locality may require all the residents of a displacement area to join its trash collection service if at least 55% of that area’s property owners have petitioned the county to take over trash collection.

Finally, given the broad authority conferred upon localities,¹¹ a locality can, but is not required to, maintain a parallel public and private trash service. The county could, therefore, allow residents to opt out of the public trash collection service and maintain a private service.

CONCLUSION

Accordingly, it is my opinion that Fairfax County may compel residents who currently use trash collection services provided by a private entity to join the county trash collection program, provided that either the statutory requirements for service displacement are met, or 55% of the property owners in the displacement area want to participate in the county services. I also conclude that a county may, but is not required to, allow residents to opt out of the public trash collection service and maintain a parallel private collection service.

¹ VA. CODE ANN. § 15.2-901(A)(1) (2008).

² Section 15.2-931(B) (2008) (emphasis added).

³ *Id.*

⁴ Section 15.2-934 (2008).

⁵ A prior opinion of this Office expressly concluded that “a county is not authorized to establish a mandatory garbage pickup and disposal service.” 1980-81 Op. Va. Att’y Gen. 123; but that opinion has been superseded by subsequent legislation. *See* 1984 Va. Acts ch. 763 at 2083; 1995 Va. Acts ch. 660 (adopting the provisions in notes 2, 3, *supra*, respectively).

⁶ Section 15.2-934.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Section 15.2-931(B).

OP. NO. 10-096

COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, COURTHOUSES AND SUPPLIES – SHERIFFS

EDUCATION: PUPILS – COMPULSORY SCHOOL ATTENDANCE

Sheriff’s office may assist, without court order, a local school division with enforcing the compulsory attendance laws by serving notice of an upcoming meeting to the parents of a truant student, provided the local school board has requested such assistance.

THE HONORABLE B.J. ROBERTS
SHERIFF, CITY OF HAMPTON
NOVEMBER 19, 2010

ISSUE PRESENTED

You ask whether a sheriff's office, pursuant to a local initiative, can serve notice of truancy meetings to parents and legal guardians without a court order prior to the filing of a petition with the courts.

RESPONSE

It is my opinion that a sheriff's office lawfully can assist, without a court order, a local school division with enforcing the compulsory attendance laws by serving notice of an upcoming meeting to the parents or custodians of a truant student, provided the local school board, division superintendent or the administration of a school has requested such assistance from the Sheriff.

BACKGROUND

You relate that the Hampton Juvenile and Domestic Relations District Court, in conjunction with the Commonwealth's Attorney Office, the Sheriff's Office and the Court Services Unit, among others, has established a program to combat truancy and its underlying issues. You indicate that, in order to avoid formal court action, the initiative includes holding meetings with parents and guardians prior to filing criminal truancy charges or child-in-need-of-supervision petitions. You further state that, in order to conduct the meeting, the Sheriff's Office has been tasked with serving notice of the meeting to the parents or custodians of a particular child to inform them of the time and place of the meeting. You note, however, that this service is to be issued without a court order or petition in place.

APPLICABLE LAW AND DISCUSSION

Sheriffs are constitutional officers "whose duties and authority are controlled by statute."¹ Section 15.2-1609 provides that "the sheriff shall exercise all the powers conferred and perform all the duties imposed upon sheriffs by general law." Except as limited by the law, constitutional officers are "free to discharge [their] constitutional duties in the manner in which [they] deem most appropriate."²

Sheriffs are called upon by statute to "assist in the judicial process as provided by general law."³ Although the Code provides numerous instances in which the Sheriff can be called upon to serve process or other notice,⁴ the scenario you present is not among them. The notices are not issued by a court. Thus, no general law specifically *requires* your office to serve the described notices.

Sheriffs are also tasked with the duty to "enforce the law."⁵ The creation of a local police department does not extinguish this general duty.⁶ Violation of Virginia's compulsory attendance law is a Class 3 misdemeanor.⁷ Ordinarily, that would be sufficient to authorize a Sheriff to take measures to remedy a violation of this law. In this context, however, a sheriff's role is circumscribed by the fact that the General Assembly has

entrusted the local school system with policing the compulsory school attendance law. Under Virginia's system of government, the school board is the entity responsible for the day-to-day operations of a local school system.⁸ As a general proposition, school attendance laws are enforced by attendance officers appointed by the school board.⁹ The school administration can also obtain the assistance of volunteers to assist the school with attendance problems.¹⁰

In light of this authority, I conclude that a Sheriff whose assistance is requested by school officials, including the school board, the division superintendent, or the administration of a particular school, may assist with the enforcement of the compulsory attendance laws by serving upon a student's parent or custodian a notice in connection with a student's school attendance. The duty to enforce the criminal law is not confined to arrests and court process. Law enforcement in the case of a juvenile suspected of a criminal violation may include working with the juvenile's parents to remedy the violation or suspected violation.¹¹

The absence of a court order does not preclude a Sheriff from serving such a notice. The notice is being provided in an effort to bring the parents and students into compliance with the compulsory attendance law, rather than pursuant to the authority of a court.

CONCLUSION

Accordingly, it is my opinion that a sheriff's office is permitted to assist a local school division with enforcing the compulsory attendance laws by serving notice of an upcoming meeting to the parents or custodians of a truant student, provided the local school board, division superintendent or the administration of a school has requested such assistance from the Sheriff.

¹ *Keathley v. Vitale*, 866 F. Supp. 272, 276 (E.D. Va. 1994) (citing *Hilton v. Amburgey*, 198 Va. 727, 96 S.E.2d 151 (1957)). *See also* VA. CONST. art. VII, § 4 ("The duties and compensation of such officers shall be prescribed by general law or special act.").

² 1984-85 Op. Va. Att'y Gen. 284, 284.

³ VA. CODE ANN. § 15.2-1609 (2008).

⁴ *See, e.g.*, VA. CODE ANN. §§ 8.01-293(A) (2007) (authorizing sheriff to serve process); 8.01-293(B) (2007) (*capias* or show cause order); 12.1-29 (2006) (writs, notices, processes, orders of the State Corporation Commission); 16.1-264 (2008) (summons); 46.2-416(A) (2010) (notice of suspension or revocation of driver's license); 55-248.31:1 (2007) (notice of pay or quit notices to tenants); 58.1-217 (2009) (writs, processes, notices, orders of the Tax Commission).

⁵ Section 15.2-1609.

⁶ *Commonwealth v. Malbon*, 195 Va. 368, 78 S.E.2d 683 (1953). Of course, "[t]he extent of the sheriff's duty in enforcing the criminal laws is shaped . . . by whether the county also has a separate police force." 1976-77 Op. Va. Att'y Gen. 257, 258.

⁷ VA. CODE ANN. § 22.1-263 (2006) (Class 3 misdemeanor to violate § 22.1-254, which mandates school attendance).

⁸ VA. CONST. art. VII, § 7.

⁹ Section 22.1-258 (2010).

¹⁰ *Id.*

¹¹ A sheriff has discretion in determining how to carry out the duties assigned to him. *See* 1984-85 Op. Va. Att’y Gen. 73 (noting the sheriff’s discretion with respect to personnel policies, cooperative agreements with federal agencies, and automobile use within the office); 1984-85 Op. Va. Att’y Gen. 284, 285 (noting the discretion of the sheriff to discharge his powers and duties includes the discretion to sponsor an occasional bake sale to raise funds for a law enforcement operation to be undertaken by his office).

OP. NO. 10-077

COUNTIES, CITIES AND TOWNS: LOCAL GOVERNMENT PERSONNEL, QUALIFICATION FOR OFFICE ETC. – APPOINTMENT OF TOWN MANAGER

TOWN CHARTER, TOWN OF CHRISTIANSBURG

A Town Council may initiate negotiations for the appointment of town manager without a resolution of the Council, so long as the contract and the appointment ultimately are approved by a vote of the Council. A contract of employment for a term of years would violate the General Assembly’s intent that municipal officers serve on an at-will basis.

THE HONORABLE DAVID A. NUTTER
MEMBER, HOUSE OF DELEGATES
SEPTEMBER 20, 2010

ISSUE PRESENTED

You inquire whether the Town Council of the Town of Christiansburg is authorized to initiate negotiations for a multi-year employment contract with the Town Manager without the Town Council first affirmatively voting to enter into any such contract.

RESPONSE

It is my opinion that a Town Council may initiate negotiations for the appointment of a town manager without a resolution of the Council, so long as the contract and the appointment ultimately are approved by a vote of the Council.

APPLICABLE LAW AND DISCUSSION

The Constitution of Virginia provides that “[t]he General Assembly shall provide by general law for the organization, government, powers, change of boundaries, consolidation, and dissolution of counties cities, towns, and regional governments”¹ and that “[t]he General Assembly may also provide by special act for the organization, government, and powers of any city, town, or regional government, including such powers of legislation, taxation, and assessment as the General Assembly may determine[.]”²

Under the Dillon Rule, localities have only those powers that the General Assembly grants them. Towns, in particular, have all the powers conferred upon them by their charters and those set forth in §§ 15.2-1100 through 15.2-1133.³ Section 15.2-1102 authorizes towns to exercise all necessary “powers pertinent to the conduct of the affairs and function of the municipal government, the exercise of which is not expressly

prohibited by the Constitution and the general laws of the Commonwealth.” Moreover, “[a] municipal corporation may provide for the organization, conduct and operation of all departments, offices, boards and agencies . . . subject to such limitations as may be imposed by its charter or otherwise by law[;]” “may establish, consolidate, abolish or change” them; and “may prescribe the powers, duties and functions thereof, except where such departments, offices, boards, commissions and agencies or the powers, duties and functions thereof are specifically established or prescribed by its charter or otherwise by law.”⁴

Section 15.2-1540 provides that “[t]he governing body of any locality may appoint a chief administrative officer, who shall be designated . . . town administrator or manager or executive, as the case may be.” The analogous provision of the Town Charter is to the same effect.⁵ Under the plain language of this statute, it is the governing body that must appoint the chief administrative officer. Nothing in the Code or Charter, however, would preclude preliminary negotiations by some members of the Town Council without the affirmative vote of all of the members, because these negotiations would not be binding on the Town Council. There is no statutory impediment so long as the ultimate decision to appoint the administrative officer and to determine the final form of the employment contract rests with the Town Council.⁶

Your inquiry raises a further question. You indicate that the contract under negotiation, but that ultimately was not approved, was a “multi-year contract.” Pursuant to its authority to “provide by general law or special act for [] officers and for the terms of their office[.]”⁷ the General Assembly has provided that “[a]ll appointments of officers and hiring of other employees by a locality shall be without definite term, unless for temporary services not to exceed one year or except as otherwise provided by general law or special act.”⁸ The Town Charter is consistent with this enactment. It provides that “all officers and employees appointed may be removed by the town council at its pleasure[.]”⁹ I therefore conclude that a contract of employment specifying a term of years would violate the General Assembly’s clear intent that the Town Manager, as a municipal officer,¹⁰ serve the Town on an at-will basis.

CONCLUSION

Accordingly, it is my opinion that a Town Council may initiate negotiations for the appointment of a town manager without a resolution of the Council, so long as the contract and the appointment ultimately are approved by a vote of the Council.

¹ VA. CONST. art. VII § 2. A “general law” is a law that applies alike to all counties, cities or towns. VA. CONST. art. VII § 1.

² *Id.* A “special act” is a law applicable to a county, city or town. VA. CONST. art. VII § 1.

³ See VA. CODE ANN. §§ 15.2-204; 15.2-1102; 15.2-1103 (2008).

⁴ Section 15.2-1107 (2008).

⁵ CHARTER OF THE TOWN OF CHRISTIANBURG, VA., § 2.04 (2005).

⁶ See VA. CODE ANN. § 15.2-1420 (2008) (governing body acts by majority vote).

⁷ VA. CONST. art. VII § 4.

⁸ VA. CODE ANN. § 15.2-1503 (2008). “Locality” includes a town. Section 15.2-102 (2008).

⁹ Charter § 2.05. Section 2.04 provides that town managers are to be appointed by the town council. A different conclusion may follow if the Charter included a grant of authority to the Town Council that provided for alternative means of appointment, hiring or removal; for “the provisions of the charter shall be construed and held to take precedence[.]” VA. CODE ANN. § 15.2-1103.

¹⁰ Charter § 2.03 classifies the town manager as a municipal officer.

OP. NO. 10-080

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING – APPROVAL OF SEWER CONSTRUCTION PLANS

Water and sewer construction plans are subject to review by the Sanitation Authority and that review is subject to statutory time limitations.

KEVIN J. BURKE, ESQUIRE
FAUQUIER COUNTY ATTORNEY
NOVEMBER 5, 2010

ISSUES PRESENTED

You ask whether construction plans that contain sewer or water infrastructure plans are subject to the requirement that the County refer such plans to the Sanitation Authority and, if so, whether the review is subject to statutory time limitations.

RESPONSE

It is my opinion that water and sewer construction plans are subject to the requirement that the Authority review the plans upon referral from the County, and that the review is subject to statutory time limitations.

APPLICABLE LAW AND DISCUSSION

Section 15.2-2259 provides for the review and approval of final subdivision plats. Under subsection A of § 15.2-2259, when “approval of a feature or features of the plat by . . . a public authority authorized by state law” is required, the County must forward the plat to this authority for review within 10 days of receipt. Section 15.2-2259(A)(3) provides that “the provision of this subsection shall not apply to the review and approval of construction plans.” Section 15.2-2269 provides that whenever “the owners of such subdivision desire to construct in, on, under, or adjacent to any streets or alleys located in such subdivision any . . . water [or] sewer or . . . pipes . . . fixtures or systems, they shall present plans or specifications therefore to the governing body of the locality in which the subdivision is located or its authorized agent, for approval.” Under its plain language, the provisions of subsection 15.2-2259(A)(3) do not apply to construction plans.

This provision distinguishes between a “plat” and a “construction plan.” A “plat” is defined as “the schematic representation of land divided or to be divided and information in accordance with the provisions of . . . applicable statutes.” “Construction plan” is not defined.

Another provision, § 15.2-2269(A), provides that

If the owners of any such subdivision desire to construct in, on, under, or adjacent to any streets or alleys located in such subdivision any gas, water, sewer or electric light or power works, pipes, wires, fixtures or systems, they shall present plans or specifications therefore to the governing body of the locality in which the subdivision is located or its authorized agent, for approval.^[1]

That section further contemplates that such plans might be referred to an authority for review.² Therefore, under the plain language of § 15.2-2269(A), such plans must be submitted to the county or its authorized agent, rather than to the sanitation authority. The governing body, or its agent, then has 45 days within which to approve or disapprove of these plans. In instances where the locality is required to forward the plan to a state agency or an authorized public authority for review, § 15.2-2269(B) provides that the reviewing body complete its review within 45 days of receipt of the plan.

In sum, § 15.2-2259 provides a procedure for the approval of subdivision “plats” and excludes “construction plans” from its scope. Section 15.2-2269 addresses “construction plans” for “gas, water, sewer or electric light or power works, pipes, wires, fixtures or systems” and calls for the presentation of these plans to “the governing body of the locality in which the subdivision is located or its authorized agent, for approval.” The Code further contemplates that, when required, the governing body will refer those plans to the proper “state agency or public authority” for review by that authority or agency, which will approve or disapprove the plans within 45 days of their receipt.

CONCLUSION

Accordingly, it is my opinion that water and sewer construction plans are subject to the requirement that the Authority review the plans upon referral from the County, and that the review is subject to statutory time limitations.

¹ As the legislative history makes clear, the term “such subdivision” in § 15.2-2269(A) refers to subdivisions mentioned in § 15.2-2258, rather than the subdivisions mentioned in § 15.2-2266. Section 15.2-2266 provides that “subdivision plat[s] recorded prior to January 1, 1975, if otherwise valid, [are] hereby validated and declared effective even though the technical requirements for recordation existing at the time such plat was recorded were not complied with.” The precursor to that section was inserted in the Code in 1968. 1986 Va. Acts. ch. 279. As originally written, it is clear that the term “such subdivision” currently codified in § 15.2-2269(A) referenced the subdivisions now mentioned in § 15.2-2258. *See* 1962 Va. Acts. ch. 407.

² Confusingly, § 15.2-2269(B) provides that “[a]ny state agency or public authority authorized by state law making a review of any plat forwarded to it under this article . . . shall complete its review within 45 days of receipt of the plans.” This sentence refers to a “plat” and a “plan.” I conclude that the term “plat” in this subsection embraces the construction plans referenced in the immediately preceding subsection.

OP. NO. 10-065

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING – CASH PROFFERS

Until July 1, 2014, notwithstanding any cash proffer agreement to the contrary, a locality may not accept any uncollected proffer payment until a time after final inspection and before the issuance of a certificate of occupancy.

THE HONORABLE CHRISTOPHER K. PEACE
MEMBER, HOUSE OF DELEGATES
SEPTEMBER 13, 2010

ISSUES PRESENTED

You ask whether newly enacted § 15.2-2303.1:1,¹ which prohibits localities from collecting conditional zoning cash proffers at any time other than after completion of the final inspection and prior to issuance of any certificate of occupancy for the subject property, applies to proffer agreements that were formed prior to July 1, 2010, the effective date of the statute. You also raise the issue of whether such retrospective application would violate the Contracts Clause of the United States or the Virginia Constitutions.

RESPONSE

It is my opinion that, as of July 1, 2010 and through July 1, 2014, a locality may *not* accept or demand payment of any uncollected cash proffer payments, including those agreed to prior to July 1, 2010, until the completion of a final inspection and prior to the issuance of a certificate of occupancy for the subject property, notwithstanding the provisions of any such proffer agreement to the contrary.² It is further my opinion this interpretation does not infringe the Contracts Clauses of the United States or of the Virginia Constitutions.

BACKGROUND

You relate that certain Virginia localities have taken the position that the enactment of § 15.2-2303.1:1 does not apply to proffers formed prior to July 1, 2010. Thus, these localities contend that zoning applicants who entered such proffer agreements remain obligated to make payments in accordance with such proffers, notwithstanding the new provision delaying payment of uncollected cash proffers until completion of a final inspection. You suggest that the law is intended to help residential builders weather a difficult economic period by delaying collection of payments owed pursuant to certain cash proffers.

APPLICABLE LAW AND DISCUSSION

Section 15.2-2280 grants localities the ability to enact zoning ordinances. Sections 15.2-2296 through 15.2-2303.3 further authorize and govern the use of “conditional zoning,” which entails, “as part of classifying land within a locality into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, such conditions being in addition to, or modification of the regulations provided

for a particular zoning district or zone by the overall zoning ordinance.”³ Such conditions may include the voluntary proffer by a zoning applicant of certain cash payments to the locality.⁴ As you note, however, these cash proffers are now subject to the provisions of § 15.2-2303.1:1.

Section 15.2-2303.1:1 provides, in its entirety, as follows:

- A. Notwithstanding the provisions of *any* cash proffer requested, offered, or accepted pursuant to § 15.2-2298, 15.2-2303, or 15.2-2303.1 for residential construction on a per-dwelling unit or per-home basis, cash payment made pursuant to such a cash proffer shall be collected or accepted by any locality only after completion of the final inspection and prior to the time of the issuance of any certificate of occupancy for the subject property.
- B. The provisions of this section shall expire on July 1, 2014.^[5]

The statute does not state explicitly whether it is limited to prospective application or if it is to be applied retrospectively as well, thereby delaying collection of proffered payments that were agreed to prior to the law’s effective date of July 1, 2010.

Nonetheless, when statutory language is unambiguous, its plain and natural meaning will control.⁶ Here, the language of the Act makes it applicable to “*any* cash proffer ... for residential construction on a per-dwelling unit or per-home basis.” The word “any” is an unrestrictive modifier and is generally considered to apply without limitation.⁷ The plain meaning of the word “any” includes, by definition, *all* proffers of the type described in the Act without limitation, including any time restrictions.⁸

Not only the text of the statute, but also its legislative history indicates that the law was intended to apply to proffers formed prior to the Act’s effective date. An amendment was offered that proposed including language that would expressly except from the law’s application those proffer agreements entered into prior to July 1, 2010, and specifically provided for collection of the cash payments sometime prior to final inspection. That limiting language was rejected in favor of the original text that included the word “any” and contained no words of limitation. I therefore conclude that the General Assembly intended for the legislation to apply to all proffers of the type described in the Act, including those made before July 1, 2010.

I conclude further that the application of the Act to proffers formed prior to July 1, 2010 presents no constitutional problem as it relates to the localities’ interest in receiving the agreed-to proffer. The Constitution of the United States provides that “[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts[.]”⁹ and the Constitution of Virginia imposes the same prohibition upon the General Assembly specifically.¹⁰ Known as the “Contracts Clause,” these similar provisions “protect against the same fundamental invasion of rights.”¹¹

The purpose of the Contracts Clause is to impose “*some* limits upon the state’s power ‘to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.’”¹² A long line of cases makes clear that the Contracts Clause does not

protect a municipality from modification or abrogation of a municipality's contracts by the State.¹³ Rather, the Contracts Clause operates to protect private parties from the government.

*City of Portsmouth v. Virginia Railway and Power Company*¹⁴ illustrates this distinction. There, the Supreme Court of Virginia upheld the order of the State Corporation Commission ("SCC") that granted the request of the Virginia Railway and Power Company ("Virginia Railway") to discontinue operation of one of its passenger rail lines in the City of Portsmouth (the "City"). The City appealed the order, claiming that its contract with Virginia Railway "created an inviolable contract between the company and the city, which was protected by the contract clause of the Federal Constitution."¹⁵

The Court disagreed with the City's contention, stating that, "the municipality, being a mere agent of the State, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed, or revoked, without the impairment of any *constitutional obligation*."¹⁶ The Court articulated further that, "[a] municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the State, exercising and holding powers and privileges subject to the sovereign will."¹⁷

The state, thus, could terminate the contract between the City and Railway, notwithstanding the terms of the contract of the City and the Railway to the contrary. In sum, where the state is exercising its police power over its agents, *e.g.*, executive agencies or as here, localities, who have only those powers delegated to it by the state, there is no unconstitutional impairment to the agent's contract rights, for "[t]he state, having authorized such contract, could revoke or modify it at its pleasure."¹⁸ Applied to your inquiry this means that, because localities derive their zoning and conditional zoning authority from the Commonwealth,¹⁹ that power remains subject to the reserved legislative powers of the state.²⁰ As such, any contracts and agreements made pursuant to such grants of authority, including cash proffer agreements, are subject to such reservation and the state therefore may modify retroactively the payment terms.²¹

CONCLUSION

Accordingly, to the extent the Act does not impair the contract or vested rights of the zoning applicant, it is my opinion that § 15.2-2303.1:1 applies to cash payment proffers formed before July 1, 2010 so that a locality may *not* accept or demand payment of any uncollected cash proffer payments until the completion of a final inspection and prior to the issuance of a certificate of occupancy for the subject property, notwithstanding the provisions of any such proffer agreement to the contrary. It is further my opinion this interpretation does not infringe the Contracts Clauses of the United States or of the Virginia Constitutions.

¹ The Virginia Code Commission codified Chapters 549 and 613 of the 2010 Acts of Assembly as § 15.2-2303.1:1.

² For purposes of this Opinion and without reference to any specific proffer agreement, it is assumed that the legislation does not operate to impair substantially or divest any substantive rights of the zoning applicant under such proffer agreements.

³ VA. CODE ANN. § 15.2-2201 (2008).

⁴ See §§ 15.2-2298; 15.2-2303; 15.2-2303.1; 15.2-2303.2; 15.2-2303.3 (2008).

⁵ Section 15.2-2303.1:1 (Supp. 2010) (emphasis added).

⁶ See *Portsmouth v. Chesapeake*, 205 Va. 259, 269, 136 S.E.2d 817, 825 (1964).

⁷ *Sussex Comm. Serv. Ass'n v. Virginia Soc. for Mentally Retarded Children, Inc.*, 251 Va. 240, 243-44, 467 S.E.2d 468, 469-70 (1996) (holding the plain meaning of phrase “any covenant” included all covenants described in the statute without limitation, whether such covenants were recorded before after the effective date of the legislation and, therefore, a 1991 amendment to the law applied to restrictive covenants recorded in 1975); The Supreme Court of Virginia in *Sussex* cited other cases in which it has given retroactive effect to statutes containing unrestricted modifiers such as “an,” “all,” and “any.” *Sussex*, 251 Va. at 243, 467 S.E.2d at 469.

⁸ The rule of statutory interpretation that presumes statutes to be prospective in operation applies only when the intent of the legislature is in doubt; reference to such rules is inappropriate when the terms of the statute are certain and clear. See *Allen v. Motley Constr. Co.*, 160 Va. 875, 884, 170 S.E. 412, 415 (1933). Moreover, there is no requirement that any “specific word or phrase be used in order to support a finding of clear legislative intent of retroactive application.” *Sussex*, 251 Va. 240 at 245, 467 S.E.2d at 470 (refuting the contention that the phrase “heretofore or hereafter” must be included in a statute in order to apply that statute both retrospectively and prospectively).

⁹ U.S. CONST. art. I, § 10, cl. 1.

¹⁰ VA. CONST. art. I, § 11.

¹¹ *The Working Waterman's Ass'n of Va., Inc. v. Seafood Harvesters, Inc.*, 227 Va. 101, 109, 314 S.E. 2d 159, 164 (1984) (quoting 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 203 (1974)).

¹² *Id.* at 110, 314 S.E.2d at 164 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978)).

¹³ *East Hartford v. Hartford Bridge Co.*, 51 U.S. 511, 533-37 (1850) (municipality could not invoke Contracts Clause to preclude the State's from abrogating a contract between the municipality and a bridge company).

¹⁴ *Portsmouth v. Virginia Ry. & Power Co.*, 141 Va. 44, 126 S.E. 366 (1925).

¹⁵ *Id.* at 46-47, 126 S.E. at 367.

¹⁶ *Id.* at 49, 126 S.E. at 367-68 (quoting *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 399 (1919)) (emphasis added).

¹⁷ *Id.* at 50, 126 S.E. at 368 (quoting *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923)).

¹⁸ *Id.* at 49, 126 S.E. at 368 (quoting *New Orleans v. New Orleans Waterworks Co.*, 142 U.S. 79, 91 (1891) (internal quotations omitted)).

¹⁹ See *Hurt v. Caldwell*, 222 Va. 91, 96, 279 S.E.2d 138, 141 (1981).

²⁰ See generally *City of Richmond v. Pace*, 127 Va. 274, 286-87, 103 S.E. 647, 651 (1920) (quoting *Dillon on Municipal Corporations* in support of the proposition that localities, as creatures of the state, remain subject to the state's power and control: “[t]he legislature may give [a municipality] all the powers such a being is capable of receiving, making it a miniature State in that locality, or it may strip it of every power, leaving it a corporation in name only; and it may create or recreate these changes as often as it chooses, or itself may exercise directly within the locality any or all the powers usually committed to a municipality.” (citation omitted)).

²¹ This analysis is limited to a locality's interest; any impact to the rights of private parties, *i.e.* zoning applicants, would be subject to the strictures of the Contracts Clause.

OP. NO. 10-017

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING – SPECIAL EXCEPTIONS

Under existing zoning enabling statutes, local governing bodies have the authority to classify payday loan businesses as a special exception or special permit use.

THE HONORABLE G. GLENN ODER
MEMBER, HOUSE OF DELEGATES
JUNE 23, 2010

ISSUE PRESENTED

You ask whether a local governing body has the authority, under existing zoning enabling statutes, to classify payday loan businesses as a special exception or special permit use.

RESPONSE

It is my opinion that a local governing body has the authority, under existing zoning enabling statutes, to classify payday loan businesses as a special exception or special permit use.

APPLICABLE LAW AND DISCUSSION

The General Assembly has authorized the governing bodies of Virginia localities to adopt local zoning ordinances.¹ Along with zoning ordinances, local governing bodies have the prerogative to provide for special exceptions.² The action of a local governing body in enacting its zoning ordinance is presumed valid, and carries a presumption that the classification contained in the ordinance is reasonable and not arbitrary or capricious.³ Local governing bodies have “wide discretion in the enactment and amendment of zoning ordinances.”⁴ Ordinances are upheld so long as they are not unreasonable or arbitrary.⁵

In *Board of Supervisors of Fairfax County v. The Southland Corporation*, the Virginia Supreme Court held that the power to grant or deny special exceptions or use permits is a legitimate exercise of legislative, rather than administrative, power.⁶ The Court further reasoned that, “the decision of the legislative body, when framing its zoning ordinance, to place certain uses in the special exception or conditional use category . . . involves the same balancing of the consequences of private conduct against the interests of public welfare, health, and safety as any other legislative decision.”⁷

You correctly note that the General Assembly has identified payday loan businesses as a separate class from banks, savings and loans, and credit unions when enacting the Payday Loan Act.⁸ A “payday loan” is defined by § 6.1-444 of the Payday Loan Act as “a small, short-maturity loan on the security of (i) a check, (ii) any form of assignment of an interest in the account of an individual or individuals at a depository institution, or (iii) any form of assignment of income payable to an individual or individuals, other than loans based on income tax refunds.” Given this statutory backdrop, there is no reason to believe that payday loan establishments are exempted from the locality’s broad authority

to regulate land use through zoning,⁹ provided the ordinances are not unreasonable, arbitrary or capricious.¹⁰

CONCLUSION

Accordingly, it is my opinion that a local governing body has the authority, under existing zoning enabling statutes, to classify payday loan businesses as a special exception or special permit use.

¹ VA. CODE ANN. § 15.2-2280 (2008).

² Section 15.2-2286(A)(3) (Supp. 2009). The terms “special exception” and “special permit” are interchangeable. *Bd. of Supvs. of Fairfax County v. The Southland Corp.*, 224 Va. 514, 521, 297 S.E.2d 718, 721-21 (1982). “Both terms refer to the delegated power of the state to set aside certain categories of uses which are to be permitted only after being submitted to governmental scrutiny in each case, in order to insure compliance with standards designed to protect neighboring properties and the public.” *Id.* at 521, 297 S.E.2d at 721-22.

³ 224 Va. at 522, 297 S.E.2d at 722.

⁴ *Turner v. Bd. of Supvs. of Prince William County*, 263 Va. 283, 288, 559 S.E.2d 683, 686 (2002) (citation omitted).

⁵ *Id.*

⁶ *Id.* at 521-22, 297 S.E.2d at 721-22.

⁷ *Id.* at 522, 297 S.E.2d at 722.

⁸ *See* VA. CODE ANN. §§ 6.1-444 to 6.1-471 (Supp. 2009).

⁹ Of course, if challenged, the locality would have to make the required showing to justify the classification. *See Southland Corp.*, 224 Va. at 522-24, 297 S.E.2d at 722-23.

¹⁰ *See Schefer v. City Council of Falls Church*, 279 Va. 588, 595, 691 S.E.2d 778, 782 (2010) (citation omitted).

OP. NO. 09-091

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING – THE COMPREHENSIVE PLAN.

Urban development area must accommodate 10 to 20 years of anticipated growth within such area. Developers are required to zone and develop to specific densities within such areas. Local governing bodies may not deny rezoning request solely on basis of inadequate public facilities.

THE HONORABLE CHRISTOPHER K. PEACE
MEMBER, HOUSE OF DELEGATES
JANUARY 11, 2010

ISSUES PRESENTED

You inquire about § 15.2-2223.1 as it relates to the inclusion of urban development areas (“UDA”) in the comprehensive plan of Hanover County. Specifically, you ask whether UDAs must accommodate 10 to 20 years of anticipated growth in addition to or instead of growth planned and permitted in other areas. Further, you ask whether developers are

required to zone and develop to specific densities within UDAs. You ask whether the Board of Supervisors must approve rezoning to specified densities even if public facilities are inadequate. Finally, you ask whether specified densities will be increased and how the County and developers are to finance the infrastructure necessary to serve UDA style development.

RESPONSE

It is my opinion that an urban development area must accommodate 10 to 20 years of anticipated growth within such an area. It further is my opinion that developers are required to zone and develop to specific densities within such areas. Finally, it is my opinion that local governing bodies may not deny a rezoning request solely on the basis of inadequate public facilities.

LIMITATION OF OPINION

The traditional role of the Attorney General regarding opinion requests is to interpret statutes to the extent possible utilizing the pertinent rules of statutory construction and general application of the statutory provisions. Additionally, Attorneys General have a longstanding policy of responding to official opinion requests only when such requests concern an interpretation of federal or state law, rule, or regulation.¹ In instances when a request: (1) involves questions of fact and does not involve a question of law; (2) requires the interpretation of a matter reserved to another entity; (3) involves a matter currently in litigation; or (4) involves a matter of purely local concern or procedure, Attorneys General traditionally have declined to render an opinion.² Accordingly, I must limit my comments to the interpretation of § 15.2-2223.1. Further, I must decline to opine on whether the General Assembly will increase the specified densities or how the County and developers may finance the necessary infrastructure.

APPLICABLE LAW AND DISCUSSION

Article 3, Chapter 22 of Title 15.2, §§ 15.2-2223 through 15.2-2232, governs the development and adoption of a comprehensive plan. Section 15.2-2232 generally provides for the legal status of a comprehensive plan, and § 15.2-2232(A) provides that a comprehensive plan shall control the general development of land within a locality. “A comprehensive plan provides a guideline for future development and systematic change, reached after consultation with experts and the public.”³ “[T]he Virginia statutes assure [landowners] that such a change will not be made suddenly, arbitrarily, or capriciously but only after a period of investigation and community planning.”⁴ Generally, a comprehensive plan does not act as an instrument of land use control. Rather, the plan serves as a guideline for the development and implementation of zoning ordinances.⁵ As noted in a prior opinion of the Attorney General, “[a] comprehensive plan ... acts as an indirect instrument of land use control with respect to public areas, public buildings, [and] public structures ... whether publicly or privately owned.”⁷

The Supreme Court of Virginia also has acknowledged that the provisions of a comprehensive plan can be an important factor in land use decisions.⁸ For example, in the context of the special exception process, the Court specifically has approved zoning ordinance provisions governing the grant or denial of special exceptions that require the

consideration of the comprehensive plan or the general purposes of the local zoning ordinance as part of the special exception process.⁹ Thus, a comprehensive plan serves as a general guideline for the development and implementation of a zoning ordinance.¹⁰

Section 15.2-2223.1(A) requires that a locality have (1) a population of at least 20,000 and population growth of at least 5%; or (2) a population growth of at least 15% to amend its comprehensive plan to incorporate one or more UDAs. For purposes of § 15.2-2223.1, the General Assembly defines a UDA as

an area designated by a locality that is appropriate for higher density development due to proximity to transportation facilities, the availability of a public or community water and sewer system, or proximity to a city, town, or other developed area.

Further, § 15.2-2223.1(A) requires that within UDAs a comprehensive plan must “provide for commercial and residential densities ... that are appropriate for reasonably compact development at a density of at least four residential units per gross acre and a minimum floor area ratio of 0.4 per gross acre for commercial development.” Finally, the comprehensive plan is required to “designate one or more urban development areas sufficient to meet projected residential and commercial growth in the locality for an ensuing period of at least 10 but not more than 20 years, which may include phasing of development within the urban development areas.”¹¹

“A primary rule of statutory construction is that courts must look first to the language of the statute. If a statute is clear and unambiguous, a court will give the statute its plain meaning.”¹² In addition, it must be assumed that “the legislature chose, with care, the words it used when it enacted the relevant statute, and [courts] are bound by those words as [they] interpret the statute.”¹³ Courts may not rewrite statutes.¹⁴ Finally, I note that the “mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute.”¹⁵

Thus, the General Assembly specifically provides that when a locality is permitted to amend its comprehensive plan to designate one or more UDAs, the UDAs must be sufficient to meet the locality’s projected residential and commercial growth for a period of at least 10, but not more than 20 years.¹⁶ Furthermore, the General Assembly plainly requires that the UDAs must accommodate reasonably compact development at the statutorily designated levels of density and minimum floor area ratio for commercial development.¹⁷

A prior opinion of the Attorney General (the “2003 Opinion”) concludes that “the General Assembly must enact express statutory authorization to permit a local governing body to deny a rezoning request *solely* on the basis of inadequate public facilities.”¹⁸ The General Assembly has not enacted any such statutory authorization. Therefore, the conclusion of the 2003 Opinion remains valid.

CONCLUSION

Accordingly, it is my opinion that an urban development area must accommodate 10 to 20 years of anticipated growth within such an area. It further is my opinion that developers are required to zone and develop to specific densities within such areas. Finally, it is my opinion that local governing bodies may not deny a rezoning request solely on the basis of inadequate public facilities.

¹See Op. Va. Att’y Gen.: 1998 at 71, 72; 1997 at 105, 107; 1991 at 237, 238; 1989 at 288, 293 n.1; 1986-87 at 347, 348; 1977-78 at 31, 33; 1976-77 at 17, 17.

²The authority of the Attorney General to issue advisory opinion is limited to questions that are legal in nature. See, e.g., Op. Va. Att’y Gen.: 2008 at 141, 144 n.14; 2006 at 95, 97; 2002 at 144, 147; 1999 at 215, 217; 1997 at 195, 196; 1991 at 122, 124; 1977-78 at 31, 33.

³Jonesville v. Powell Valley Village Ltd. P’ship, 254 Va. 70, 76, 487 S.E. 2d 207, 211 (1997) (interpreting § 15.1-446.1, predecessor to § 15.2-2223).

⁴Bd. of Supvrs. v. Snell Constr. Corp., 214 Va. 655, 658, 202 S.E. 2d 889, 892 (1974).

⁵See 1987-88 Op. Va. Att’y Gen. 212, 213.

⁶See Bd. of Supvrs. v. Safeco Ins. Co., 226 Va. 329, 335, 310 S.E.2d 445, 448 (1983) (noting that comprehensive plan “is not a zoning ordinance but only a guideline for zoning ordinances”); 1987-88 Op. Va. Att’y Gen., *supra* note 5, at 213.

⁷See 1987-88 Op. Va. Att’y Gen., *supra* note 5, at 213.

⁸See *infra* note 9.

⁹See, e.g., Nat’l Mem’l Park v. Bd. of Zoning Appeals, 232 Va. 89, 348 S.E.2d 248 (1986) (upholding decision of zoning board that applied standards set out in county zoning ordinance to deny memorial park’s application for special use permit to operate crematory); Bell v. City Council, 224 Va. 490, 496, 297 S.E.2d 810, 814 (1982) (finding that amendments to city zoning regulations, which allowed special permits to modify setback and density requirements of zoning ordinance, were valid); Nat’l Maritime Union v. Norfolk, 202 Va. 672, 119 S.E.2d 307 (1961) (holding that challenged provision of zoning ordinance, which required use permit for union hiring hall, provided adequate standards to assure uniform application and was constitutional).

¹⁰See *Safeco Insurance*, 226 Va. at 335, 310 S.E.2d at 448; 1987-88 Op. Va. Att’y Gen., *supra* note 5 at 213.

¹¹VA. CODE ANN. §15.2-2223.1(A) (Supp. 2009).

¹²Loudoun County Dep’t of Soc. Servs. v. Etzold, 245 Va. 80, 85, 425 S.E.2d 800, 802 (1993).

¹³Va. Beach v. ESG Enters., Inc., 243 Va. 149, 153, 413 S.E.2d 642, 644 (1992) (quoting Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990))

¹⁴*Id.* at 295, 396 S.E.2d at 674.

¹⁵Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992); see also Christiansburg v. Montgomery County, 216 Va. 654, 658, 222 S.E.2d 513, 516 (1976); Tate v. Ogg, 170 Va. 95, 103, 195 S.E. 496, 499 (1938); 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2007); Op. Va. Att’y Gen.: 1998 at 33, 34; 1992 at 145, 146 (applying or explaining maxim *expressio unius est exclusio alterius*).

¹⁶See § 15.2-2223.1(A).

¹⁷See *id.*

¹⁸2003 Op. Va. Att’y Gen. 42, 43 (emphasis in original).

OP. NO. 10-040

COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER

TAXATION: ENFORCEMENT, COLLECTION, REFUNDS, REMEDIES AND REVIEW OF LOCAL TAXES – COLLECTION BY DISTRESS, SUIT, LIEN, ETC.

Local police officers have no authority in civil matters, absent four statutory exceptions.

Local police may not distrain property for payments owed to the locality.

MS. BARBARA O. CARRAWAY

CITY TREASURER FOR THE CITY OF CHESAPEAKE

JULY 8, 2010

ISSUE PRESENTED

You inquire whether the local police force can participate in the distraint¹ of property for the collection of delinquent City accounts.

RESPONSE

It is my opinion that police officers do not have the civil authority to distrain property for payments owed to the City.

BACKGROUND

You note that a vehicle equipped with a license plate reader could be used to “distrain property and collect on delinquent accounts.” You describe a license plate reader as an apparatus consisting of a high-speed camera mounted on the vehicle, which is then connected to an onboard computer. The computer can run information on the captured plates against various databases. You state that because of the expense of the readers, you hoped to partner with the police department and share the costs of installing and maintaining the equipment. Because the license plate readers would be installed on police vehicles, you have asked whether the police department can be involved in the civil collection process.

APPLICABLE LAW AND DISCUSSION

Code § 58.1-3941 provides in relevant part that

Any goods or chattels, money and bank notes in the county, city or town belonging to the person or estate assessed with taxes, levies or other charges collected by the treasurer may be distrained therefore by the treasurer, sheriff, constable or collector. Property subject to levy or distress for taxes shall be liable to levy or distress in the hands of any person for taxes, penalties and interest thereon^[2]

By statute, local police officers are vested with “all the power and authority which formerly belonged to the office of constable at common law.”³ Their chief responsibility is “the prevention and detection of crime, the apprehension of criminals, the safeguard of

life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances.”⁴

The General Assembly has provided that, “a police officer shall have no authority in civil matters,”⁵ subject to four specified exceptions: (1) “execut[ing] and serving temporary detention and emergency custody orders;” (2) “serv[ing] an order of protection;” (3) executing certain warrants or summons; and (4) “deliver[ing], serv[ing], execut[ing] and enforc[ing] orders of isolation and quarantine.”⁶ Distraining civil property is a civil matter which does not fall within the plain language of the limited civil authority provided to police officers.⁷

Section 58.1-3941 does not alter this conclusion. It does not authorize police officers to distrain property. Instead, it states that “the treasurer, sheriff, constable or collector” may distrain certain property. Police officers are not “constables.” Instead, they are “invested with the power and authority which formerly belonged to the office of constable at common law” but with that broad grant of authority then being expressly limited in civil matters. Code § 1-200 provides in pertinent part that, “[t]he common law of England . . . shall continue in full force within the same, and shall be the rule of decision, except as altered by the General Assembly.”⁸ Furthermore, in interpreting statutes, “[t]he common law will not be considered altered or changed by statute *unless* the legislative intent is plainly manifested.”⁹ The General Assembly plainly manifested that intent by providing that police officers have “no authority in civil matters” except in the specified situations.¹⁰ Distraining property is not one of the specified exceptions.

Further support can be found in previous opinions by this office, which all conclude in a variety of contexts that police departments do not have specific civil authority beyond what is set forth in Code § 15.2-1704.¹¹

CONCLUSION

Accordingly, it is my opinion that police officers do not have the civil authority to distrain property for payments owed to the City.

¹To “distrain” means “to take as a pledge property of another, and keep it until he performs his obligation” BLACK’S LAW DICTIONARY 474 (6th ed. 1990).

²VA. CODE ANN. § 58.1-3941(A) (2005).

³VA. CODE ANN. § 15.2-1704(A) (2008).

⁴*Id.*

⁵Section 15.2-1704(B) (2008).

⁶*Id.*

⁷The words and phrases in a statute should be given their ordinary meaning unless a different intention is obvious. *See* Smith v. Commonwealth, 26 Va. App. 620, 625, 496 S.E.2d 117, 119 (1998). “Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed.” *Id.* at 625, 496 S.E.2d at 119 (quoting Weinberg v. Given, 252 Va. 221, 225-26, 476 S.E.2d 502, 504 (1996)) (other citations omitted). *See also* Commonwealth v. Zamani, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998) (“The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction.”).

⁸VA. CODE ANN. § 1-200 (2008).

⁹ *Boyd v. Commonwealth*, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988) (citations omitted).

¹⁰ Section 15.2-1704(B).

¹¹ *See, e.g.*, 2007 Op. Va. Att’y Gen. 108, 113 (noting that § 15.2-1704 does not appear to give police officers arrest authority for civil violations of federal immigration law); 1976-1977 Op. Va. Att’y Gen. 81, 82 (concluding that city police are expressly prohibited from serving civil process for collection of unpaid fines); 1976-77 Op. Va. Att’y Gen. 204, 205 (concluding that transfer and movement of private funds between various locations are matters of civil nature and not within duties of police officer) (these opinions were issued before the 1982 amendment to § 15.1-138, which was repealed and recodified as § 15.2-1704).

OP. NO. 10-029

COUNTIES, CITIES AND TOWNS: VIRGINIA INDOOR CLEAN AIR ACT

Use of e-cigarette does not fall under definition “smoke” or “smoking” for purposes of Act.

THE HONORABLE CHRISTOPHER K. PEACE

MEMBER, HOUSE OF DELEGATES

APRIL 27, 2010

ISSUE PRESENTED

You ask whether an e-cigarette falls within the definition of smoke or smoking for purposes of § 15.2-2820.

RESPONSE

It is my opinion that using an e-cigarette does not fall within the definition of “smoke” or “smoking” for purposes of § 15.2-2820.

BACKGROUND

You relate that an electronic cigarette, also known as an e-cigarette or a personal vaporizer, is a battery-powered device that provides inhaled doses of nicotine by way of a vaporized solution. You note that the e-cigarette serves as an alternative to traditionally smoked tobacco products, such as cigarettes, cigars, or pipes. Finally, you observe that the e-cigarette produces no smoke and no combustion is involved in its operation.

APPLICABLE LAW AND DISCUSSION

Section 15.2-2824(A) prohibits smoking in a variety of locations, including elevators, public school buses, and the interior of public elementary, intermediate and secondary schools. Section 15.2-2825(A) forbids smoking in restaurants. Finally, § 15.2-2820 defines “smoke” or “smoking” as “the carrying or holding of any lighted pipe, cigar, or cigarette of any kind, or any other lighted smoking equipment, or the lighting, inhaling, or exhaling of smoke from a pipe, cigar, or cigarette of any kind.”

First, an e-cigarette does not involve the “inhaling, or exhaling of smoke.” Smoke is defined as “the gaseous products of burning carbonaceous materials made visible by the presence of small particles of carbon.”¹ To be sure, one definition of smoke is “fume or

vapor often resulting from the action of heat on moisture.”² That, however, is not the way the term smoke is commonly understood.³ Statutes should be construed under their “ordinary and plain meaning.”⁴ Water vapor containing traces of particulate matter, such as water evaporating from a tea kettle, is not ordinarily understood to be “smoke.” An e-cigarette does not function in manner of a traditional cigarette because it functions electrically⁵ rather than via combustion of a material such as tobacco. Therefore, the vapor emitted by an e-cigarette would not fall within the definition of “smoke” or “smoking” in § 15.2-2820. Second, an e-cigarette is battery powered and is not “lighted” as that term is commonly understood.⁶ No flame is involved in its operation.

CONCLUSION

Accordingly, it is my opinion that using an e-cigarette does not fall under the definition “smoke” or “smoking” for purposes of § 15.2-2820.

¹MERRIAM-WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2152 (1993).

²*Id.*

³The *Third New International Dictionary* provides, as an illustration of the “fume or vapor” definition of “smoke,” a quote from sixteenth-century English author John Lyly: “steeds ... whose breaths dimmed the sun with [smoke].” *Id.* Referring to exhalation as “smoke” is not a common use of the term “smoke.”

⁴*See, e.g.,* Winborne v. Va. Lottery, 278 Va. 142, 148, 677 S.E.2d 304, 306 (2009).

⁵*See, e.g.,* <http://www.ecigaretteschoice.com/pages/How-it-Works.html> (last visited Apr. 19, 2010) (explaining how e-cigarette works).

⁶*See* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 671 (10th ed. 2001) (defining “light” to mean “to ignite something (as a cigarette)” or “to set fire to”).

OP. NO. 10-022

COUNTIES, CITIES AND TOWNS: VIRGINIA WATER AND WASTE AUTHORITIES ACT – FINANCING

Tazewell County Public Service Authority Board may not assess nonuser service charge to persons who decline to accept its refuse collection services.

C. ERIC YOUNG, ESQ.

TAZEWELL COUNTY ATTORNEY

APRIL 20, 2010

ISSUE PRESENTED

You ask whether the Tazewell County Public Service Authority Board may charge a nonuser fee to persons whose properties front the streets along a proposed refuse collection and disposal service route, and who decline the collection service.

RESPONSE

It is my opinion that the Tazewell County Public Service Authority Board may not assess a nonuser service charge to persons who decline to accept its refuse collection services.

BACKGROUND

You state that the Tazewell County Public Service Authority Board (“Board”) was organized pursuant to Chapter 51 of Title 15.2, §§ 15.2-5100 through 15.2-5159. You relate that pursuant to § 15.2-5121, the Board is considering the establishment of a refuse collection and disposal system within Tazewell County. The Board is seeking advice regarding whether it may charge a nonuser fee to persons whose properties front on the streets along the proposed route, but who decline to use the collection service.

APPLICABLE LAW AND DISCUSSION

Section 15.2-5102(A) authorizes the governing body of a locality to create “a refuse collection and disposal authority.” Section 15.2-5136(A) authorizes a public service authority (“PSA”) to establish “rates, fees and other charges ... for the use of and for the services furnished or to be furnished” by a PSA. Section 15.2-5136(F) specifically authorizes the setting of rates and charges for a refuse collection system.

Virginia follows the Dillon Rule of strict construction applicable to the powers of local governing bodies, limiting such powers to those conferred expressly by law or by necessary implication from such conferred powers. The Dillon Rule provides that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable.¹ “[T]he Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end.”²

Section 15.2-5137 authorizes a PSA to charge nonuser fees for particular services. Specifically, § 15.2-5137(B) authorizes a PSA to assess a “monthly nonuser service charge” to persons for whom PSA water service is available, but who use private water systems instead. Similarly, § 15.2-5137(C) authorizes a “monthly nonuser service charge” for persons to whom public sewer service is available, but who use private septic systems. I find nothing in § 15.2-5137 that specifically allows a PSA to assess a nonuser service charge to persons who decline refuse collection services or that generally allows nonuser service charges for any nonspecified services a PSA provides.

Section 15.2-5137 specifically authorizes nonuser service charges for water systems and public sewer services; however, I find no similar authority for nonuser service charges for refuse collection services.³ Therefore, based on the applicable rules of statutory construction,⁴ the Board is not authorized to assess nonuser service charges to persons who decline its refuse collection services.

CONCLUSION

Accordingly, it is my opinion that the Tazewell County Public Service Authority Board may not assess a nonuser service charge to persons who decline to accept its refuse collection services.

¹ City of Richmond v. Bd. of Supvrs., 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958).

²Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

³When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute. See 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2007) (explaining maxim of statutory construction, “*expressio unius est exclusio alterius*”); Op. Va. Att’y Gen.: 2002 at 117, 118; 1992 at 145, 146; 1989 at 252, 253; 1980-1981 at 209, 209-10. Where a statute specifies certain things, the intention to exclude that which is not specified may be inferred. See *id.*; 1999 Op. Va. Att’y Gen. 215, 217-18.

⁴See *supra* notes 1-3 and accompanying text.

OP. NO. 10-068

COURTS NOT OF RECORD: DISTRICT COURT JUDGES-SANCTIONS

PROFESSIONS AND OCCUPATIONS: LAWYERS-UNAUTHORIZED PRACTICE OF LAW

A district court may impose a pre-filing review requirement if appropriate and has the inherent authority to prevent an attorney or litigants from engaging in the unauthorized practice of law.

THE HONORABLE BARBARA J. GADEN
JUDGE, RICHMOND GENERAL DISTRICT COURT
AUGUST 30, 2010

ISSUES PRESENTED

You inquire regarding the authority of general district courts and juvenile and domestic relations district courts (collectively, “district courts”), to regulate, limit or prohibit a person from practicing or appearing in those courts. Specifically, you ask, first, whether a Virginia district court has jurisdiction to impose a pre-filing review requirement if it finds such a sanction to be “appropriate” under Code § 8.01-271.1. Second, you ask if a court has the inherent authority to limit or prevent an attorney or a litigant from appearing before it in the event the court determines, after a hearing, that the attorney or litigant has engaged in the unauthorized practice of law or otherwise has engaged in unprofessional or unethical conduct. Finally, if the district courts lack such authority, you inquire whether a circuit court can impose a pre-filing review requirement on an action filed in the district court and, further, whether the circuit court can restrict a litigant or attorney from appearing in the district court based on the litigant’s or attorney’s improper conduct in the district court.

RESPONSE

It is my opinion that a district court may, pursuant to § 8.01-271.1, impose a pre-filing review requirement if such a sanction is appropriate. It is further my opinion that a district court has the inherent authority to limit or prevent an attorney or a litigant from practicing before it in the event the court determines, after a hearing, that the attorney or litigant has engaged in the unauthorized practice of law or otherwise has engaged in unprofessional or unethical conduct.

BACKGROUND

You relate that your court has encountered a *pro se* litigant with a known history of initiating harassing and frivolous litigation who already has been barred by various circuit and federal courts from filing suit without first obtaining leave of court. You note that these filing restrictions apply only to those specific courts but do not apply to your district court, where this litigant will file frivolous cases and then nonsuit them when a defendant appears. You further report that a non-attorney has appeared before the court and has engaged in the unauthorized practice of law. Finally, you have observed attorneys engaged in unprofessional, potentially unethical conduct.

APPLICABLE LAW AND DISCUSSION

Section 8.01-271.1 provides that the signature of an attorney or a party on a pleading constitutes a certification by the signatory that

(i) he has read the pleading, motion or other paper; (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a pleading is signed in violation of these provisions, a court is authorized to impose “an appropriate sanction.”¹

First, § 8.01-271.1 is not limited to circuit courts. By its terms, it applies to “every pleading.” The only limitation on sanctions is that a sanction be “appropriate.” Therefore, where appropriate, a district court may impose upon an abusive litigant a requirement of pre-filing review. Although the appropriateness of a sanction necessarily is fact specific, when a litigant repeatedly has filed frivolous or harassing pleadings, requiring pre-filing review is appropriate. Section 8.01-271.1 also allows a court, where appropriate, to sanction an attorney or litigant who has violated the strictures of this statute by, for example, filing a pleading for the purpose of harassing or causing unnecessary delay.

I note that engaging in unprofessional or unethical conduct, or engaging in the unauthorized practice of law, would not by itself trigger the application of § 8.01-271.1. This statute, by its plain terms, is limited to actions taken with respect to pleadings and motions. Therefore, § 8.01-271.1 is limited in its application and does not authorize a court to impose sanctions for all manner of misconduct.

The Supreme Court of Virginia has held that courts have the inherent power, independent of statutory authority, to “suspend or annul the license of an attorney practicing in the particular court which pronounces the sentence of disbarment.”² At times, the Court has limited its discussion of such powers to “courts of record.”³ In other opinions, the Court has spoken more broadly of such powers as inherent in all courts.⁴ The Supreme Court

of Virginia explained that the purpose underlying this inherent authority is to protect the public and the courts.⁵ The need to protect the public and the integrity of the judicial process is no less in district courts than in other courts. Therefore, I conclude that district courts possess the inherent authority to bar an attorney or a litigant from practicing before that court if the facts warrant such a sanction.⁶

Of course, the power of all Virginia courts to discipline attorneys and parties is not without limits. For example, the inherent power of a trial court “to supervise the conduct of attorneys practicing before it and to discipline any attorney who engages in misconduct does not include the power to impose as a sanction an award of attorney’s fees and costs to the opposing party.”⁷ Such sanctions serve to punish rather than to protect the public, and run counter to Virginia’s strong adherence to the “American rule.”⁸

Finally, I note that the Code expressly provides the power of a district court to punish for summary contempt.⁹ To the extent that a party, an attorney or a *pro se* litigant engages in conduct worthy of contempt in the presence of the court, the court may sanction such conduct.¹⁰

CONCLUSION

Accordingly, it is my opinion that a district court may, pursuant to § 8.01-271.1, impose a pre-filing review requirement if such a sanction is appropriate. It is further my opinion that a district court has the inherent authority to limit or prevent an attorney or a litigant from practicing before it in the event the court determines, after a hearing, that the attorney or litigant has engaged in the unauthorized practice of law or otherwise has engaged in unprofessional or unethical conduct.

¹ VA. CODE ANN. § 8.01-271.1 (Supp. 2010).

² See *In re: Moseley*, 273 Va. 688, 696, 643 S.E.2d 190, 194 (2007) (quoting *Legal Club of Lynchburg v. Light*, 137 Va. 249, 119 S.E. 55 (1923)).

³ *Id.*

⁴ *Nusbaum v. Berlin*, 273 Va. 385, 399, 641 S.E.2d 494, 501 (2007).

⁵ *Id.* at 400, 641 S.E.2d at 502.

⁶ Because I answer your first two questions in the affirmative, I need not answer your remaining questions concerning an alternate procedure through the circuit court.

⁷ *Id.*

⁸ *Id.*

⁹ VA. CODE ANN. §§ 16.1-69.24 (2010); 18.2-458 (2009).

¹⁰ *Judicial Inquiry & Review Comm’n of Va. v. Peatross*, 269 Va. 428, 447, 611 S.E.2d 392, 402 (2005) (noting the inherent authority of “any judge in Virginia” “to supervise the conduct of attorneys practicing before him and to discipline an attorney who engages in misconduct, which includes the right to remove an attorney of record in a case.”); *Nusbaum*, 273 Va. at 399, 641 S.E.2d at 501 (noting that “the courts of this Commonwealth have the inherent power to supervise the conduct of attorneys practicing before them and to discipline any attorney who engages in misconduct.”).

OP. NO. 10-063

COURTS OF RECORD: CLERKS, CLERK'S OFFICES' AND RECORDS

Clerks may operate recording systems in courtrooms and charge a fee for providing duplication of the electronic recording of court proceedings.

THE HONORABLE SCOTT A. SUROVELL

MEMBER, HOUSE OF DELEGATES

AUGUST 2, 2010

ISSUES PRESENTED

You inquire whether a Clerk of Court may install recording systems into a Circuit Court, General District Court, and/or Juvenile and Domestic Relations Court and require such systems to be on at all times court is in session. You also ask whether the Clerk may charge a fee for access to such recordings provided that confidentiality is maintained for all proceedings as required by the *Code of Virginia* or orders of the Court.

RESPONSE

It is my opinion that a Clerk of Court may install recording systems into a Circuit Court, General District Court, and/or Juvenile and Domestic Relations Court and require such systems to be on at all times court is in session and, further, that the Clerk may charge a fee for access to such recordings provided that confidentiality is maintained for all proceedings as required by the Virginia Code or Court orders.

BACKGROUND

You relate that during the 2010 legislative session, you introduced House Bill 827, a bill designed to authorize Clerks to install in courtrooms electronic recording systems that remain permanently on and to charge a fee for providing a copy of the recording. Referring to the fact that the U.S. District Court for the Eastern District of Virginia in Alexandria and the D.C. Superior Court have maintained a digital recording system for at least ten years, you suggest that such a system minimizes the need for court reporters, thereby saving clients and the Commonwealth money; protects the record and the openness and integrity of the proceedings; and improves the quality of jurisprudence in Virginia.

APPLICABLE LAW AND DISCUSSION

Any number of prior opinions of this office conclude that clerks of court have broad discretion to carry out their duties, and to perform additional duties, so long as (1) the General Assembly has not forbidden them from engaging in a particular practice, or (2) a particular task does not conflict with the higher authority of other judicial officers in specific situations.¹ I know of no statute that would prohibit a clerk from recording proceedings or from installing equipment that would record proceedings. Therefore, clerks may, in their discretion, record court proceedings provided that the confidentiality of the recordings is maintained as required by the Virginia Code or Court orders.

Code § 17.1-275(8) authorizes a Clerk to charge a fee for duplication of an “electronic record.”² Electronic recordings of court proceedings would qualify as an electronic record. The fees may not exceed the actual cost of preparing the record.³ Furthermore, Clerks may not charge a fee *to the Commonwealth* unless specifically authorized by statute.⁴

CONCLUSION

Accordingly, it is my opinion that that a Clerk of Court may install recording systems into a Circuit Court, General District Court, and/or Juvenile and Domestic Relations Court and require such systems to be on at all times court is in session and, further, that the Clerk may charge a fee for access to such recordings provided that confidentiality is maintained for all proceedings as required by the Code of Virginia or other orders of the Court.

¹ See, e.g., 2009 Op. Va. Att’y Gen. 60 (circuit court clerk may, but is not required to, assist judge with preparation of sketch orders); 2003 Op. Va. Att’y Gen. 60 (clerks have discretion but are not obligated to provide deputy clerk in courtroom during civil proceedings); 2001 Op. Va. Att’y Gen. 113 (court may enter a standing order requiring clerk to credit payments toward restitution before collecting court costs); 1987-88 Op. Va. Att’y Gen. 258 (chief judge has authority to close clerk’s office when necessary to protect health and safety of court personnel or public).

² This Office previously opined that a clerk could charge a fee for making microfilm copies under this section. 1989 Op. Va. Att’y Gen. 156.

³ See VA. CODE ANN. §§ 17.1-278(8) (2010) (providing that the fees for making copies of electronic records must be accessed in conformity with § 2.2-3704); 2.2-3704(F) (Supp. 2010) (specifying that fees for making copies of public records may “not exceed [the Clerk’s] actual cost incurred in accessing, duplicating, supplying or searching for the requested records.”).

⁴ Section 17.1-266 (2010).

OP. NO. 10-109

COURTS OF RECORD: CLERKS, CLERK’S OFFICES’ AND RECORDS – FEES

The fee for service of a writ of fieri facias and fieri facias in detinue is \$12 for each person served, while the fee for a writ of possession is \$25, with an additional \$12 for each additional defendant served.

THE HONORABLE BILL WATSON
SHERIFF, CITY OF PORTSMOUTH
NOVEMBER 24, 2010

ISSUE PRESENTED

You inquire under § 17.1-272 what amount you may charge for serving and executing writs of possession, writs of fieri facias in detinue and fieri facias.

RESPONSE

It is my opinion that § 17.1-272 authorizes you to charge an initial fee of \$25 for service of a writ of possession and to add \$12 to that fee for each additional defendant who is served.

APPLICABLE LAW AND DISCUSSION

Section 17.1-272(A)(1) authorizes a fee of \$12 for “service on any person, firm or corporation, an order, notice, summons or any other civil process.” Therefore, the default fee established in the Code for service of papers is \$12.¹ Section 17.1-272(B) allows a \$25 fee for “process and service” with respect to “service of a writ of possession, except that there shall be an additional fee of \$12 for each additional defendant.” Therefore, with respect to a writ of fieri facias, the fee is \$12 for each person or entity served. The fee for service of a writ of possession is \$25, but where an additional defendant must be served, an additional \$12 fee may be charged. Therefore, when a single defendant is served with a writ of possession, the total fee is \$25.

CONCLUSION

Accordingly, it is my opinion that the fee for process and service of a writ of fieri facias and fieri facias in detinue is \$12 for each person served and the fee for service and process for a writ of possession is \$25, with an additional fee of \$12 for each additional defendant who is served.

¹ Virginia Form CC-1478 (“Writs of Possession and Fieri Facias in Detinue”), issued by the Supreme Court of Virginia, contains both the writ of possession and writ of fieri facias within one document, contemplates simultaneous service and alternative execution of the writs, and thus the service fee for the writ of fieri facias in detinue is subsumed within the fee for the writ of possession unless the writ of fieri facias in detinue is served alone in a particular case.

OP. NO. 10-090

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE PERSON – ASSAULT AND BATTERY

The enhanced punishment provision of 18.2-57 do not apply to any medical personnel other than employees of the Department of Corrections and members of volunteer rescue squads.

THE HONORABLE RALPH S. NORTHAM

MEMBER, SENATE OF VIRGINIA

SEPTEMBER 24, 2010

ISSUE PRESENTED

You ask whether the assault and battery statute, § 18.2-57, provides health care professionals who serve in correctional facilities with the same enhanced punishment protections afforded to law enforcement personnel.

RESPONSE

It is my opinion that, except for employees of the Department of Corrections involved in the care of inmates, and volunteers and members of a bona fide rescue squad who are engaged in the performance of their duties, medical personnel who provide care to inmates are not covered by the enhanced punishment provisions of § 18.2-57.

APPLICABLE LAW AND DISCUSSION

Section 18.2-57 provides in relevant part that

A. Any person who commits a simple assault or assault and battery shall be guilty of a Class 1 misdemeanor

* * *

C. In addition, if any person commits an assault or an assault and battery against another knowing or having reason to know that such other person is . . . a person employed by the Department of Corrections directly involved in the care, treatment or supervision of inmates in the custody of the Department . . . or rescue squad member who is a member of a bona fide volunteer fire department or volunteer rescue or emergency medical squad regardless of whether a resolution has been adopted by the governing body of a political subdivision recognizing such firefighters or members as employees, engaged in the performance of his public duties, such person is guilty of a Class 6 felony, and, upon conviction, the sentence of such person shall include a mandatory minimum term of confinement of six months.

Having found no controlling authority interpreting the provisions of the statute about which you inquire, it must be interpreted according to its plain language.¹ First, the statute plainly provides that assault and battery can be elevated to a felony if the crime involves “lifesaving or rescue squad member[s] who” are members of a “bona fide volunteer fire department or volunteer rescue or emergency medical squad.”

Second, for persons who are “employed by the Department of Corrections directly involved in the care, treatment or supervision of inmates,” § 18.2-57(C) provides that an assault and battery against such persons, when the inmate “knows or has reason to know” these persons are involved in the care or treatment of inmates, constitutes a Class 6 felony. Therefore doctors, nurses, and other personnel who are employed by the Department of Corrections receive an additional level of protection from the statute. I note that the language “employed by” the Department of Corrections suggests that independent contractors who have a contract with the Department to provide care would not be covered by this language.²

An assault and battery committed upon medical personnel not listed in the statute would not give rise to a felony charge. Thus, medical personnel employed by local or regional jails, and other persons providing medical care to inmates, such as personnel in the emergency room of a local hospital, are not covered under the enhanced penalty provisions of § 18.2-57(C). An assault and battery committed on such persons would constitute, at most, a Class 1 misdemeanor.

CONCLUSION

Accordingly, it is my opinion that, except for employees of the Department of Corrections involved in the care of inmates, and volunteers and members of a bona fide rescue squad who are engaged in the performance of their duties, medical personnel who provide care to inmates are not covered by the enhanced punishment provisions of § 18.2-57.

¹ “When the language in a statute is clear and unambiguous, [courts will] apply the statute according to its plain language.” *Virginia Polytechnic Inst. v. Interactive Return Serv. Inc.*, 271 Va. 304, 309, 626 S.E.2d 436, 438 (2006). See, e.g., *South v. Commonwealth*, 47 Va. App. 247, 623 S.E.2d 419 (2005); *Cline v. Commonwealth*, 53 Va. App. 765, 675 S.E.2d 223 (2009) (limiting the application of § 18.2-57(C) to “law-enforcement officers” as explicitly defined in the section).

² This conclusion is strengthened by the rule of lenity. Under this rule of statutory construction, penal statutes “must be strictly construed against the state and limited in application to cases falling clearly within the language of the statute.” *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

OP. NO. 10-064

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY – GAMBLING

When element of consideration is lacking because opportunity to win a prize is offered both with a purchase and without the requirement of a purchase, no illegal gambling occurs.

THE HONORABLE BILL JANIS
MEMBER, HOUSE OF DELEGATES
JULY 30, 2010

ISSUE PRESENTED

You ask whether prizes offered by a retail provider of internet and computer services are permissible or whether they constitute illegal gambling under the laws of Virginia when entries to win prizes are available to persons who purchase computer time as well as to those who do not.

RESPONSE

It is my opinion that the element of consideration is missing, and therefore no illegal gambling occurs, when the opportunity to win a prize is offered both with a purchase and without the requirement of a purchase.

BACKGROUND

You relate that a business engages in the sale of internet and computer time. Consumers who purchase time on the computers use on-site computers that are equipped with high-speed internet access and various software programs, including word processing and spreadsheets. This business also provides office support services at this location, including fax and copying services.

When customers purchase internet time, they are issued entries for possible prizes. The purchaser of time has several options to determine whether the entry is a winning entry. First, the cashier can announce whether any of the entries are winners. Second, the computer stations are equipped with software that will reveal whether any of the entries are winners. Finally, the computer user can select a game that uses a display to reveal whether any of the entries are winners. Selecting the game option does not improve the odds of winning and does not deplete the customer’s purchased internet time. Regardless

of the method used to learn whether any of the entries are winners, the odds and prizes remain the same.

You further represent that consumers also may obtain free entries by logging into their account on the terminal or by mail. The odds of winning are the same regardless of whether the entries are provided in conjunction with a purchase of internet time, or whether the entries are received for free.

APPLICABLE LAW AND DISCUSSION

Illegal gambling is a crime.¹ Section 18.2-325 broadly defines “illegal gambling” as:

The making, placing or receipt of any bet or wager in the Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of the Commonwealth.

Section 18.2-325 further states that

the making, placing, or receipt of any bet or wager of money or other thing of value shall include the purchase of a product, which purchase credits the purchaser with free points or other measurable units that may be risked by the purchaser for an opportunity to win additional points or other measurable units that are redeemable by the purchaser for money at the location where the product was purchased.

Finally, if a “lawful game, contest, lottery, scheme or promotional offering” complies with the requirements contained in § 18.2-325.1, it is not prohibited.² Section 18.2-325.1, enacted during the 2010 General Assembly,³ provides in relevant part that

Pursuant to subdivision 1 b of § 18.2-325, any lawful game, contest, lottery, scheme, or promotional offering (the contest) may be conducted provided the following requirements are met:

1. There is available a method of free entry to all participants wishing to enter the contest without a purchase.
2. There is equal opportunity to play and equal odds of winning for all participants regardless of whether a participant entered with a valid purchase or through a free alternative method of entry.

Section 18.2-325.1 (3) through (6) requires that certain disclosures be made. Finally, the legislation states that its provisions are declaratory of existing law.

It is well settled that “an activity constitutes illegal gambling when the elements of prize, chance and consideration are present together.”⁴ The promotional scheme you describe clearly includes the elements of prize and chance. Therefore, whether the activity is illegal depends on whether the element of “consideration” is also present. Consideration is not present

because of any person’s attendance upon the premises of another; his execution, mailing or delivery of an entry blank; his answering of questions, verbally or in writing; his witnessing of a demonstration or other proceeding; or any one or more thereof, where no charge is made to, paid by, or any purchase required of him in connection therewith.^[5]

Prior opinions of the Attorney General consistently have concluded “that the element of consideration is missing when no purchase is required to enter into a drawing or other game of chance, but that it is present when eligibility to receive a prize is limited to those who make a purchase.”⁶ Section 18.2-325.1, which expressly provides that its provisions are declaratory of existing law, is consistent with this longstanding interpretation of “consideration.”

I must further caution that, ultimately, the application of various elements of a criminal offense to a specific set of facts rests with the Commonwealth’s attorney, the grand jury and the trier of fact.

CONCLUSION

Accordingly, it is my opinion that the element of consideration is missing, and therefore no illegal gambling occurs, when the opportunity to win a prize is offered both with a purchase and without the requirement of a purchase.

¹ VA. CODE ANN. § 18.2-326 (2009) (setting forth the punishment for illegal gambling); *see also* VA. CODE ANN. § 18.2-328 (2009) (setting forth the punishment for persons who operate an illegal gambling enterprise).

² Section 18.2-325 (2010).

³ 2010 Va. Acts ch. 877.

⁴ 2002 Op. Va. Att’y Gen. 144, 145.

⁵ VA. CODE ANN. § 18.2-332 (2009).

⁶ 2002 Op. Va. Att’y Gen. at 146. *See also* 2008 Op. Va. Att’y Gen. 3, 4-5 (discussing the element of “consideration” in the context of poker games); 1997 Op. Va. Att’y Gen. 97, 98 (concluding that prizes awarded as part of a safety program conducted in the workplace were not illegal gambling because no consideration was present); 1981-82 Op. Va. Att’y Gen. 175, 175-76 (concluding that consideration is absent when cable television company’s offer of entry blank to consumers required no purchase or subscription to cable service); 1977-1978 Op. Va. Att’y Gen. 238, 238-39 (concluding that the element of consideration is present where eligibility to receive prize is limited to those who purchase clothing memberships); 1969-70 Op. Va. Att’y Gen. 167, 167 (concluding that consideration is absent when no purchase is required for participating in give-away promotion).

OP. NO. 10-095

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY-GAMBLING

Described hypothetical examples would constitute illegal gambling because elements of prize, chance and consideration are present.

THE HONORABLE R. EDWARD HOUCK
MEMBER, SENATE OF VIRGINIA
OCTOBER 15, 2010

ISSUE PRESENTED

You ask whether illegal gambling statutes have been violated in certain hypothetical scenarios that center on payment of money in exchange for a product, such as a phone card or a DVD, but the product offered to the consumer is not in fact the object of the transaction; instead, the consumer disregards the item “purchased” and seeks the opportunity to play a game of chance in order to win prizes or money.

RESPONSE

It is my opinion that the hypothetical examples you describe would constitute illegal gambling because the elements of prize, chance and consideration are present.

BACKGROUND

You posit several scenarios in which a customer enters what you refer to as a “free spin” or a “free spin parlor” and the customer inserts \$5 into a machine or provides \$5 to a clerk. In exchange, the customer receives one of the following:

- A long distance telephone card purportedly worth \$5 of long distance calls. Most customers do not use the calling cards and simply discard them in the store;
- A DVD rental ticket purportedly valued at \$5, which entitles the customer to rent two DVD movies. The DVD selection is very limited and most customers simply discard the rental tickets on the floor or in trash bins;
- Computer internet rental time worth \$5, but the internet time is rarely used by customers, except to play a “sweepstakes” game over the internet.

Following one of the purchases described above, the customer is given the opportunity to play on a “slot machine” style game, which may be through a stand-alone gaming device, computer, or other similar game, where the customer has the chance to win money or a prize.

In your hypothetical, the majority of customers do not claim the product being promoted by the machines, but rather continue to play casino-like games in an effort to accumulate sufficient points to win prizes that are paid out daily.

You further assume that the “free spin parlor” posts the notice of odds of winning prizes and other information required by § 18.2-325.1. Each free spin customer is entitled to one completely free spin (one play worth a certain amount of points) per “free spin parlor” per day. The customer’s ability to otherwise play the “free spin” machines, however, is limited only by the number of times he pays \$5 to “purchase” the product as described above.

APPLICABLE LAW AND DISCUSSION

Illegal gambling is a crime.¹ Section 18.2-325 broadly defines “illegal gambling” as:

The making, placing or receipt of any bet or wager in the Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of the Commonwealth.

Section 18.2-325 further states that

the making, placing, or receipt of any bet or wager of money or other thing of value shall include the purchase of a product, which purchase credits the purchaser with free points or other measurable units that may be risked by the purchaser for an opportunity to win additional points or other measurable units that are redeemable by the purchaser for money at the location where the product was purchased.

In addition, § 18.2-331 prohibits the possession of a “gambling device.” A “gambling device” is broadly defined as

a. Any device, machine, paraphernalia, equipment, or other thing, including books, records and other papers, which are actually used in an illegal gambling operation or activity, and

b. Any machine, apparatus, implement, instrument, contrivance, board or other thing, including but not limited to those dependent upon the insertion of a coin or other object for their operation, which operates, either completely automatically or with the aid of some physical act by the player or operator, in such a manner that, depending upon elements of chance, it may eject something of value or determine the prize or other thing of value to which the player is entitled; provided, however that the return to the user of nothing more than additional chances or the right to use such machine is not deemed something of value within the meaning of this subsection; and provided further, that machines that only sell, or entitled the user to, items of merchandise of equivalent value that may differ from each other in composition, size, shape or color, shall not be deemed gambling devices within the meaning of this subsection.

Such devices are no less gambling devices if they indicate beforehand the definite result of one or more operations but not all the operations. Nor are they any less a gambling device because, apart from their use or adaptability as such, they may also sell or deliver something of value on a basis other than chance.^[2]

Section 18.2-328 provides that “[t]he operator of an illegal gambling enterprise, activity or operation shall be guilty of a Class 6 felony.” The section further provides that operators who engage continuously in the illegal endeavor in excess of thirty days, or whose gross revenue exceeds \$2,000 for a single day, are subject to a fine up to \$20,000 and one to ten years imprisonment.

Finally, if a “lawful game, contest, lottery, scheme or promotional offering” complies with the requirements contained in § 18.2-325.1, it is not prohibited.³ Section 18.2-325.1, enacted during the 2010 General Assembly,⁴ provides in relevant part that

Pursuant to subdivision 1 b of § 18.2-325, any lawful game, contest, lottery, scheme, or promotional offering (the contest) may be conducted provided the following requirements are met:

1. There is available a method of free entry to all participants wishing to enter the contest without a purchase.
2. There is equal opportunity to play and equal odds of winning for all participants regardless of whether a participant entered with a valid purchase or through a free alternative method of entry.

Section 18.2-325.1(3) through (6) requires that certain disclosures be made. Finally, the legislation states that its provisions are declaratory of existing law.

It is well settled that “an activity constitutes illegal gambling when the elements of prize, chance and consideration are present together.”⁵ Prior opinions of the Attorney General consistently have concluded “that the element of consideration is missing when no purchase is required to enter into a drawing or other game of chance, but that it is present when eligibility to receive a prize is limited to those who make a purchase.”⁶ Section 18.2-325.1, which expressly provides that its provisions are declaratory of existing law, is consistent with this longstanding interpretation of “consideration.” This means that sweepstakes offers do not constitute gambling when no purchase is required to participate in the sweepstakes. The element of consideration is missing in that scenario.

A recent opinion of this office concluded that the practices of certain hypothetical “internet cafes” did not constitute illegal gambling on the specific hypothetical facts described. That opinion contemplated a situation in which an internet café offered computer services, including electronic mail, software such as word processing and spreadsheets, and other office services like fax and copying machines, and offered patrons a chance to earn free minutes when they purchased minutes for computer usage. Computer users could play a game to earn free minutes, or the cashier could inform the patron whether they had won. Furthermore, there were opportunities to participate in these sweepstakes by mail, with no requirement of purchase. Copy centers and certain

coffee shops meet this description: they offer computer use for a fee, and those legitimate businesses are not precluded from using sweepstakes to promote their businesses. The opinion cautioned, however, that “ultimately, the application of various elements of a criminal offense to a specific set of facts rests with the Commonwealth’s attorney, the grand jury and the trier of fact.”⁷

You describe a scenario different from the one at issue in the prior opinion. In your hypothetical examples, the elements of prize, chance and consideration are present. The hypothetical transactions purport to constitute a bargained for exchange, aided by a sweepstakes style game. In your hypothetical examples, however, the product is, demonstrably, of no interest to the consumer. Instead, the consumer is interested in the opportunity to play a game of chance in an effort ultimately to win money or prizes. As the Court of Appeals of Texas pointed out in an analogous fact pattern, “the decision turns on whether the sweepstakes was intended to promote the sale of telephone cards or whether the telephone cards were there as an attempt to legitimize an illegal gambling device.”⁸ The court persuasively observed that “the mere pretense of free prizes, designed to evade the law, would not negate the element of consideration.”⁹ Ultimately, that court upheld the jury’s conclusion that the defendants had engaged in illegal gambling because the evidence established that

the main purpose and function of the machines, and the business, was to induce people to play the game, agreeing to gain or lose something of value at least partially by chance, and not to promote telephone cards; that it was [the defendant’s] intent to structure the business to entice players to exchange money for chances to play, which they did; and that the telephone cards were not the primary subject of the transaction, but mere subterfuge.^[10]

Decisions from other courts have reached the same conclusion.¹¹

Section 18.2-325.1 does not compel a contrary result. That section governs a “lawful game, contest, lottery, scheme or promotional offering” and specifies certain requirements for such contests.¹² That section does not legitimize gambling that masquerades as a purchase. Rather, it specifies certain requirements for lawful sweepstakes and promotions. Offering a customer a free spin of the roulette wheel or of a slot machine at a casino, with subsequent turns requiring payment, would not render casinos legal in Virginia.

The United States Supreme Court aptly observed, in the context of lottery schemes, that

[e]nforcing such legislation has long been a difficult task. Law enforcement officers, federal and state, have been plagued with as many types of lotteries as the seemingly inexhaustible ingenuity of their promoters could devise in their efforts to circumvent the law. When their schemes reached the courts, the decision, of necessity, usually turned on whether the scheme, on its own peculiar facts, constituted a lottery. So varied have been the techniques used by promoters to conceal the joint factors of prize, chance, and consideration, and so clever have they been in applying these

techniques to feigned as well as legitimate business activities, that it has often been difficult to apply the decision of one case to the facts of another.^[13]

The same holds true of various machines and sweepstakes. Some will constitute legitimate marketing exercises or entertainment, others will cross the line into illegal gambling. I must again caution, as I did with the most recent opinion on the subject, that, in the final analysis, “the application of various elements of a criminal offense to a specific set of facts rests with the Commonwealth’s attorney, the grand jury and the trier of fact.”¹⁴

CONCLUSION

Accordingly, it is my opinion that the hypothetical examples you describe would constitute illegal gambling because the elements of prize, chance and consideration are present.

¹ VA. CODE ANN. § 18.2-326 (2009) (setting forth the punishment for illegal gambling). Only the forms of gambling that are specifically excepted by law (private residence wagering and, generally, regulated activities that include the Lottery, pari-mutuel wagering on horse racing and charitable gaming as defined by statute) are not subject to the gambling prohibition.

² Section 18.2-325(3) (Supp. 2010).

³ Section 18.2-325(1)(b).

⁴ 2010 Va. Acts ch. 877.

⁵ 2002 Op. Va. Att’y Gen. 144, 145.

⁶ 2002 Op. Va. Att’y Gen. at 146. *See also* 2008 Op. Va. Att’y Gen. 3, 4-5 (discussing the element of “consideration” in the context of poker games); 1997 Op. Va. Att’y Gen. 97, 98 (concluding that prizes awarded as part of a safety program conducted in the workplace were not illegal gambling because no consideration was present); 1981-82 Op. Va. Att’y Gen. 175, 175-76 (concluding that consideration is absent when cable television company’s offer of entry blank to consumers required no purchase or subscription to cable service); 1977-1978 Op. Va. Att’y Gen. 238, 238-39 (concluding that the element of consideration is present where eligibility to receive prize is limited to those who purchase clothing memberships); 1969-70 Op. Va. Att’y Gen. 167, 167 (concluding that consideration is absent when no purchase is required for participating in give-away promotion).

⁷ 2010 Op. Va. Att’y Gen. 10-064 at 3.

⁸ *Jester v. Texas*, 64 S.W.3d 553, 558 (Tex. Ct. App. 2001) (upholding jury conviction on gambling charges).

⁹ *Id.*

¹⁰ *Id.* at 558-59.

¹¹ *See Sun Light Prepaid Phonecard Co., Inc. v. South Carolina*, 600 S.E.2d 61 (S.C. 2004) (concluding under the facts of the case that phone card dispensers were gambling devices under South Carolina law because they functioned “like slot machines and not traditional vending machines.”); *Tennessee v. Vance*, 2004 Tenn. Crim. App. LEXIS 317 (April 8, 2004 Tenn. Crim. App.) (concluding on the facts of the case that the “free spin” machines that dispensed low value baseball cards were illegal gambling devices); *MDS Investments, LLC v. City of Boise*, 65 P.3d 197 (Idaho 2003) (“Free spin” machines constituted illegal gambling devices); *Jack Eiser Sales Co., Inc. v. Wilson*, 752 N.E.2d 225 (Ind. Ct. App. 2001) (“free spin” machines were prohibited gambling devices). *See also* *Ward v. West Oil Co.*, 692 S.E.2d 516 (S.C. 2010) (concluding that “pull-tab” machines were illegal gambling devices); *Animal Protection Soc. v. State*, 382 S.E.2d 801 (N.C. 1989) (affirming summary judgment against the promoters of a bingo game because the evidence showed that the product being promoted was illegal bingo, not the sale of plastic hair combs and peppermint candies).

¹² Section 18.2-325.1 (Supp. 2010).

¹³ FCC v. Am. Broad. Co., 347 U.S. 284, 292-93 (1954).

¹⁴ 2010 Op. Va. Att’y Gen. 10-064 at 3.

OP. NO. 10-069

CRIMINAL PROCEDURE: SENTENCE; JUDGMENT; EXECUTION OF SENTENCE – GENERAL PROVISIONS

Sheriff deputies must carry out court’s verbal detention orders and enjoy qualified sovereign immunity while others are in there custody.

THE HONORABLE DENNIS S. PROFFITT
SHERIFF, COUNTY OF CHESTERFIELD
AUGUST 30, 2010

ISSUES PRESENTED

You inquire regarding the legality of a court’s pronouncement of sentence that includes the verbal direction to sheriff’s deputies to take a defendant into custody for a specified number of hours, when such direction is given without the court’s written order or other document. You inquire further concerning any potential liability the sheriff’s office might incur when it complies with such an order.

RESPONSE

It is my opinion that such verbal direction is equivalent to a written order and therefore is binding upon the sheriff’s office and that sheriff’s deputies carrying out such orders enjoy the same qualified sovereign immunity they have when others are in their custody.

BACKGROUND

You present a scenario in which an individual has been sentenced to some period of incarceration for a criminal offense and, upon pronouncement of the sentence, the Court issues a verbal order sentencing the convicted defendant to detention for a period of hours in a holding cell, without a written committal order, disposition notice, or any other written document.¹

APPLICABLE LAW AND DISCUSSION

An order of the court that is delivered verbally is no less binding than a written order upon the party to whom it is directed. “In the trial of a case the court gives many orders and commands which are not reduced to writing or directed in writing to the person who is bound to obey them.”² Disobeying such an oral order would “tend to embarrass or defeat the administration of justice.”³ Where a court’s oral order is sufficiently specific, it may be enforced through the court’s contempt powers. Contempt powers apply to both a court’s written orders as well as to its “oral orders, commands and directions.”⁴

Virginia Code § 19.2-307 contemplates the ultimate entry of a written order. In the context of a sentence by a court not of record, that statutory provision has been held to require such a court to “memorialize its judgment by setting forth ‘[the] plea, [the court’s] verdict or findings and the adjudication and sentence.’”⁵ Although a court’s order as to the defendant’s sentence ultimately should be reduced to writing, for purposes of the period following delivery of the verbal order and prior to production of a written judgment, it may be prudent to include in the jail’s regularly maintained business records contemporaneous notes detailing such verbal directions, and to have the verbal order witnessed by officials of the sheriff’s office.

You indicate a concern for civil or criminal liability of sheriffs’ deputies should something occur to the individual while detained in the sheriff’s custody under the circumstances you describe. As a general proposition, the liability of the sheriff is the same, whether the period of incarceration is lengthy or short. While the duty to feed and care for all prisoners confined in the county jail remains the statutory duty of the office of the sheriff,⁶ government officials employed by the sheriff’s office and engaged in discretionary functions are generally shielded from liability for civil damages, provided their actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have been aware.⁷ Notwithstanding this qualified immunity from liability, however, to the extent that officials with the sheriff’s office are aware of a significant risk to a prisoner’s health or safety, and act or fail to act with deliberate indifference to such risk, liability may be found if the jailer denies constitutionally guaranteed humane conditions of confinement.⁸

I further note that § 8.01-195.3 provides immunity from tort liability under the Virginia Tort Claims Act when the claim is “based upon an act or omission of an officer, agent or employee of any agency of government in the execution of a lawful order of any court.” This provision provides a further shield from liability.⁹ This statutory provision codifies longstanding principles of immunity for officers who carry out a lawful order.¹⁰

CONCLUSION

Accordingly, it is my opinion that a verbal order to take a defendant who has been sentenced to incarceration into custody is a binding order upon the sheriff’s office and that the sheriff’s office is generally shielded from liability when it takes persons into custody pursuant to such orders.

Although the issue is not explicitly presented by your inquiry, I note that if a court, based on reasons that were purely punitive and unrelated to a legitimate non-punitive purpose, directed sheriff’s deputies to take into custody an individual who had not yet been convicted of a criminal offense, such an order could violate the constitutional due process rights of that person. *Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988) (noting that in the context of a pretrial detainee who has not yet been convicted of an offense, constitutionally impermissible punishment includes that which is either “imposed with an express intent to punish,” or “not reasonably related to a legitimate non-punitive governmental objective”). Examples of legitimate non-punitive purposes include, but are not limited to, the revocation upon some good cause shown of any pre-trial bail previously granted to the individual, *see Dorsey v. Virginia*, 32 Va. App 154, 162-63, 526 S.E.2d 787, 791-92 (2000); and the imposition of summary punishment for contemptuous behavior before the court. VA. CODE ANN. §§ 18.2-456, 18.2-458, 19.2-11, 19.2-129; *see generally Scialdone v. Commonwealth*, 279 Va. 422, 689

S.E.2d 716 (2010). Similarly, were a court to demand that a convicted defendant be confined for a term of hours, but for reasons independent of any sentence for the offenses of which the individual was convicted, such an order would be without any legal authority, because a court is without authority to impose punishment unmoored from the sentence for a specific offense of which an individual has been convicted. “Chief Justice Marshall wrote that ‘[t]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.’” *Podracky v. Commonwealth*, 52 Va. App. 130, 143, 662 S.E.2d 81, 88 (2008) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)). Thus, a court for example could not sentence an individual to the payment of a fine, but nevertheless order his or her confinement for a period of hours for the purpose of teaching of him or her a lesson.

² *Robertson v. Commonwealth*, 181 Va. 520, 531, 25 S.E.2d 352, 356 (1943).

³ *Id.*

⁴ *Id.* at 537, 25 S.E.2d at 359.

⁵ *Wilson v. Commonwealth*, 40 Va. App. 250, 253, 578 S.E.2d 831, 832 (2003), quoting *McBride v. Commonwealth*, 24 Va. App. 30, 34-35, 480 S.E.2d 126, 128 (1997).

⁶ VA. CODE ANN. § 15.2-530 (2008).

⁷ See *Johnson v. Caudill*, 475 F.3d 645, 650 (4th Cir. 2007), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

⁸ See generally *Farmer v. Brennan*, 511 U.S. 825 (1994).

⁹ See *Patten v. Commonwealth*, 262 Va. 654, 553 S.E.2d 517 (2001) (discussing cases applying § 8.01-195.3(4)).

¹⁰ See *Coverdell v. Dep’t of Soc. & Health Servs.*, 834 F.2d 758 (9th Cir. 1987) (citing cases).

OP. NO. 10-025

DOMESTIC RELATIONS: MARRIAGE GENERALLY – LICENSURE AND SOLEMNIZATION

Authority vested in a person authorized to perform the rites of matrimony in Virginia does not extend to ceremonies conducted outside the territorial boundaries of the Commonwealth.

THE HONORABLE MICHELE B. MCQUIGG
PRINCE WILLIAM COUNTY CIRCUIT COURT CLERK
MAY 18, 2010

ISSUE PRESENTED

You ask if a valid marriage exists where: (a) the bride and groom are issued a marriage license by a clerk of a Virginia circuit court; (b) the ceremony is performed by a minister or other person authorized in Virginia to celebrate the rites of marriage; and (c) the solemnization of the marriage occurs in a state other than Virginia.

RESPONSE

It is my opinion that the authority vested in a minister or other person authorized to perform the rites of matrimony in Virginia does not extend to a celebration of marriage under a Virginia marriage license when the ceremony is conducted outside the territorial boundaries of the Commonwealth of Virginia.

BACKGROUND

You advise that a couple obtained a marriage license from your office. You relate that the couple travelled to Bethesda, Maryland, and were married in a ceremony conducted in Maryland. You note that the individual who performed the marriage ceremony was properly authorized to do so within the Commonwealth of Virginia under an order issued by the Circuit Court of Fairfax County.¹

APPLICABLE LAW AND DISCUSSION

There are two mandatory steps for a valid marriage in the Commonwealth: licensure and solemnization. Section 20-13 states that “[e]very marriage in this Commonwealth shall be under a license and solemnized in the manner herein provided.” In this instance, there is no question regarding the propriety of the license issued by your office. The issue concerns the solemnization of the marriage.

The General Assembly has authorized three distinct classes of persons to celebrate the rites of matrimony in the Commonwealth. The first class consists of ministers of any religious denomination who present to the circuit court, or a judge or clerk of such court, the credentials listed in § 20-23 and receive an order “authorizing such minister to celebrate the rites of matrimony in this Commonwealth.”² The second class consists of persons, other than ministers, to whom a circuit court judge has issued an order permitting them “to celebrate the rites of marriage in the Commonwealth.”³ The third class, which is not relevant to your inquiry, consists of certain active or retired judges or justices who “may celebrate the rites of marriage anywhere in the Commonwealth without the necessity of bond or order of authorization.”⁴

In interpreting statutes, “[w]e must ... assume that the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute.”⁵ The authorization granted to a minister of any religious denomination, pursuant to § 20-23, specifically limits that authority to the celebration of the “rites of matrimony in this Commonwealth.” Likewise the authorization granted to a person, other than a minister, pursuant to § 20-25, extends only “to celebrate the rites of marriage in the Commonwealth.” In the facts you present, the individual performing the marriage ceremony was properly authorized by either § 20-23 or by § 20-25. As such, his authority to perform the rites of matrimony is limited to the Commonwealth of Virginia.

The inquiry does not end with §§ 20-23 and 20-25. The General Assembly has enacted “an exception to the requirement of celebrating the marriage in the state where the license is issued.”⁶ Section 20-37.1 provides that:

All marriages heretofore solemnized outside this Commonwealth by a minister authorized to celebrate the rites of marriage in this Commonwealth, under a license issued in this Commonwealth, and showing on the application therefor the place out of this Commonwealth where said marriage is to be performed, shall be valid as if such marriage had been performed in this Commonwealth.

The term “heretofore” “‘in its common acceptance, means before: before and up to the present time; before, or down to, this time; hitherto; in time past, previous time, or previously; up to this time; and it may mean in times before the present; formerly.’”⁷ Therefore, it is my opinion that § 20-37.1 is limited in its application to marriages performed before this statute went into effect. To read the statute otherwise would render the term “heretofore” superfluous. “Words in a statute should be interpreted, if possible, to avoid rendering words superfluous.”⁸ Section 20-37.1 was enacted in 1952.⁹ Of course, a couple wishing to be married outside of the boundaries of Virginia by a minister licensed in Virginia has any number of avenues to ensure their marriage is valid in Virginia.¹⁰

CONCLUSION

Accordingly, it is my opinion that the authority vested in a minister or other person authorized to perform the rites of matrimony in Virginia generally does not extend to a celebration of marriage under a Virginia marriage license when the ceremony is conducted outside the territorial boundaries of the Commonwealth of Virginia.

¹You did not specify whether the person celebrating the marriage was a minister, performing the rites of matrimony pursuant to § 20-23, or a person other than a minister, performing the rites of matrimony pursuant to § 20-25. This distinction, however, is irrelevant for the purposes of this opinion.

²Section 20-23 (2008).

³Section 20-25.

⁴*Id.*

⁵*Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990).

⁶1982-83 Op. Va. Att’y Gen. 336, 337. In the 1983 opinion, the Attorney General addressed whether the marriage of a couple who had obtained a Virginia marriage license, but were married by a celebrant who was not qualified in Virginia, was valid. *Id.* at 336. The facts presented in the opinion were not clear regarding whether the marriage ceremony took place in Virginia or North Carolina. *Id.* The Attorney General concluded that the exception in § 20-37.1 did not apply because the section “expressly states that the marriage must be performed by a minister authorized to celebrate the rites of marriage in this State.” *Id.* at 337. The 1983 opinion is distinguishable from the facts you present since you indicate that the celebrant was authorized to celebrate the rites of marriage in the Commonwealth. Prior to the enactment of § 20-37.1 and in response to a question by the patron of the bill that became § 20-37.1, the Attorney General concluded that a marriage celebrated in West Virginia by a minister qualified to perform marriages in Virginia was not valid. *See* 1951-52 Op. Va. Att’y Gen. 101, 101.

⁷*Two-Way Tronics, Inc. v. Greater Wash. Educ. Television Ass’n, Inc.*, 206 Va. 110, 117, 141 S.E.2d 742, 747 (1965) (citation omitted).

⁸*Cook v. Commonwealth*, 268 Va. 111, 114, 597 S.E.2d 84, 86 (2004).

⁹*See* 1952 Va. Acts ch. 133, at 140, 140 (enacting statutory language codified at § 20-37.1; also providing that emergency exists and act is in force from its passage on February 27, 1952).

¹⁰For example, the marriage may be separately solemnized in Virginia, however briefly, by a minister or other person authorized to do so under § 20-23 or § 20-25 or by otherwise ensuring the marriage is valid under the law of the marriage site.

OP. NO. 10-073

DRAINAGE, SOIL CONSERVATION, SANITATION AND PUBLIC FACILITIES DISTRICTS: SANITARY DISTRICTS

Absent an agreement with another jurisdiction, a sanitary district is limited to operating only those community buildings and recreational facilities that are located within the district's boundaries.

THE HONORABLE CLIFFORD L. "CLAY" ATHEY, JR.
MEMBER, HOUSE OF DELEGATES
SEPTEMBER 9, 2010

ISSUE PRESENTED

You ask whether a sanitary district is authorized to operate and maintain community buildings and recreational facilities outside the boundaries of the sanitary district, when doing so would serve residents of the district.

RESPONSE

It is my opinion that a sanitary district is limited to operating and maintaining community buildings and recreational facilities that are located within the boundaries of the district, unless it reaches an agreement with another jurisdiction to operate buildings and facilities outside those boundaries.

APPLICABLE LAW AND DISCUSSION

The Code allows for the creation of sanitary districts.¹ Once a sanitary district is created, the governing body of a locality where the district has been established is empowered to construct, operate and maintain the water supply, garbage removal, sewerage, and power and gas systems.² Other functions of a sanitary district can include the construction, maintenance and operation of "community buildings, community centers, [and] other recreational facilities."³ The powers and duties of localities in managing sanitary districts are restricted to those specifically granted.⁴

The boundaries of a sanitary district are to be set forth in the order creating the district.⁵ The statutory scheme generally presupposes that the districts will be encompassed by a single jurisdiction.⁶ Nevertheless, in operating a sanitary district, the governing body is expressly authorized

[t]o negotiate and contract with any person, firm, corporation or municipality with regard to the connections of any such system or systems with any other system or systems now in operation or hereafter established, and with regard to any other matter necessary and proper for the construction or operation and maintenance of any such system *within the sanitary district.*^[7]

Furthermore, once a sanitary district has been created, the governing body of a locality is given the express power to

[t]o contract with any person, firm, corporation, municipality, county, authority or the federal government or any agency thereof to acquire, construct, reconstruct, maintain, alter, improve, add to and operate any such motor vehicle parking lots, water supply, drainage, sewerage, garbage removal and disposal, heat, light, power, gas, sidewalks, curbs, gutters, streets and street name signs and fire-fighting systems *in such district*, and to accept the funds of, or to reimburse from any available source, such person, firm, corporation, municipality, county, authority or the federal government or any agency thereof for either the whole or any part of the costs, expenses and charges incident to the acquisition, construction, reconstruction, maintenance, alteration, improvement, addition to and operation of any such system or systems;^[8]

The power of a sanitary district to build and operate recreational facilities and community buildings is similarly limited to the boundaries of the sanitary district.⁹

Finally, § 15.2-1300 broadly provides that

[a]ny power, privilege or authority exercised or capable of exercise by any political subdivision of this Commonwealth may be exercised and enjoyed jointly with any other political subdivision of this Commonwealth having a similar power, privilege or authority except where an express statutory procedure is otherwise provided for the joint exercise.

Based on these statutory provisions, I conclude that a sanitary district generally is limited to operating and maintaining community buildings and recreational facilities that are located within the boundaries of the district, which you indicate encompasses land only within one county. Upon reaching an agreement with another jurisdiction, however, a sanitary district properly can operate community buildings and recreational facilities outside the boundaries of the sanitary district.¹⁰

CONCLUSION

Accordingly, it is my opinion that a sanitary district is limited to operating and maintaining community buildings and recreational facilities that are located within the boundaries of the district, unless it reaches an agreement with another jurisdiction to operate buildings and facilities outside those boundaries.

¹ VA. CODE ANN. § 21-113 (2008).

² Section 21-118(1) (2008).

³ Section 21-118.4(a1) (2008).

⁴ See §§ 21-118; 21-118.4 (powers of localities with respect to sanitary districts are subject to “conditions and limitations” of the Code). See also *Marsh v. Gainesville Haymarket San. Dist.*, 214 Va. 83, 197 S.E.2d 329 (1973).

⁵ Section 21-113.

⁶ See §§ 21-113 (sanitary districts to be established “in and for the county”); 21-117 (allowing for the merger of sanitary districts originally “created in any county”); 21-118 (setting forth the powers and duties of “such

county” in which the sanitary district is created); 21-118.5 (governing body may provide a unified water and sewerage supply for “one or more sanitary districts located within such county”).

⁷ Section 21-118(3) (emphasis added).

⁸ Section 21-118.4(c) (emphasis added).

⁹ Section 21-118.4(a1).

¹⁰ *Cf.* 2004 Op. Va. Att’y Gen. 82 (locality could enter into an agreement with neighboring jurisdiction in North Carolina to create joint water authority).

OP. NO. 10-034

EDUCATION: GENERAL POWERS AND DUTIES OF SCHOOL BOARD – OPENING OF THE SCHOOL YEAR

No intervening case law alters conclusion of prior opinion that § 22.1-79.1, which directs local school boards to start school after Labor Day is not plainly unconstitutional.

THE HONORABLE ROBERT TATA
MEMBER, HOUSE OF DELEGATES
MAY 24, 2010

ISSUE PRESENTED

You inquire whether it is constitutional for the Commonwealth of Virginia to deny an elected school board the right to determine the starting date for the school calendar.

RESPONSE

I am unable to conclude that § 22.1-79.1, which directs school boards to set the starting date for students after Labor Day, is unconstitutional.

BACKGROUND

You relate that there are more than 130 school districts in Virginia. You further note that the State Board of Education permits seventy-four of these districts to set their own school calendars due to inclement weather and for other reasons. You note that § 22.1-79.1 directs local school boards to set the school calendar so that the opening day for students falls after Labor Day, except for “good cause.” Although you do not specifically inquire about § 22.1-79.1, I must assume that your inquiry is directed to the constitutionality of that statute.

APPLICABLE LAW AND DISCUSSION

A prior opinion of the Attorney General has observed that

The Constitution of Virginia “apportions various responsibilities for the creation and maintenance of Virginia’s system of public education among the General Assembly, the State Board of Education, and the local school boards.” Article VIII of the Virginia Constitution vests the

broad, statewide responsibilities in the General Assembly, in the State Board, and in the Superintendent of Public Instruction. Article VIII, § 7, provides that “[t]he supervision of schools in each school division shall be vested in a school board.” The constitutional scheme for public education makes the authority and responsibilities of local school boards subject to direction and limitation from the State Board and the General Assembly.^[1]

Consistent with this scheme, the 1986 Session of the General Assembly enacted § 22.1-79.1, which provided that:

Each local school board shall set the school calendar so that the first day students are required to attend school shall be after Labor Day. The Board of Education may waive this requirement on a showing of good cause.^[2]

By its terms, the legislation was to expire on July 1, 1988.³ The sunset provision was removed in 1998,⁴ and the definition of “good cause” was later added.⁵ The original language has remained unchanged in the current version of the law, now codified as § 22.1-79.1(A).⁶

According to the Department of Education for the 2009-2010 school year, the Board of Education authorized fifty-eight school divisions to begin their school calendars prior to Labor Day for emergency or weather-related causes, thirteen for dependent programs, and five divisions were permitted to have one or more schools open prior to Labor Day to accommodate experimental or innovative programs.

A statute is not to be declared unconstitutional unless the court is driven to that conclusion.⁸ “Every reasonable doubt should be resolved in favor of the constitutionality of an act of the legislature.”⁹ Following this doctrine, it has been a long-standing practice of Virginia’s Attorneys General to refrain from declaring a statute unconstitutional unless its unconstitutionality is clear beyond a reasonable doubt.¹⁰ This practice has its origins in well-founded considerations. Unlike a court, the Attorney General has no power to invalidate a statute.¹¹ Thus, when an Attorney General opines that a statute violates the Constitution, that statute nevertheless remains in force.¹² Further, by opining that a statute is unconstitutional, an Attorney General, in effect, is advising the enforcing state agency to ignore the statute.¹³ Unless an Attorney General is certain beyond a reasonable doubt that a reviewing court would strike down the statute, he should not opine that a statute is unconstitutional.¹⁴

No Court has declared this statute unconstitutional, nor do I find any controlling decision on point. A prior opinion of the Attorney General (“1985 Opinion”) determined that it was “constitutionally permissible for the General Assembly to mandate that the opening date for public schools be no earlier than Labor Day,”¹⁵ noting that:

[T]he General Assembly would be extending its previously mandated number of instructional days to specify that the school year may not

commence before a specified date.... I do not view this requirement as an intolerable intrusion into the prerogatives reserved to the local school boards by Art. VIII, § 7. Establishment of a beginning date is within the power reserved to the General Assembly by Art. IV, § 1, as well as Art. VIII, § 1, and cannot be said to be in derogation of the powers reserved to local units of government for supervising the schools. Setting the date for the commencement of the school year can be analogized with the designation of holidays or days when schools must be closed, a prerogative of the legislative branch of government.^[16]

The 1985 Opinion addressed a blanket prohibition of a pre-Labor Day school calendar and not the more flexible program contained in current law.

CONCLUSION

Accordingly, I am unable to conclude that § 22.1-79.1, which directs school boards to set the starting date for students after Labor Day is unconstitutional.

¹2009 Op. Va. Att’y Gen. 77, 78 (citations omitted).

²1986 Va. Acts ch. 587, at 1457.

³*Id.*

⁴1988 Va. Acts ch. 114, at 125.

⁵1998 Va. Acts ch. 702, at 1624. Section 22.1-79.1(B) sets forth three circumstances constituting “good cause”:

“1. A school division has been closed an average of eight days per year during any five of the last 10 years because of severe weather conditions, energy shortages, power failures, or other emergency situations;

“2. A school division is providing, in the school year for which the waiver is sought, an instructional program or programs in one or more of its elementary or middle or high schools, excluding the electronic classroom, which are dependent on and provided in one or more elementary or middle or high schools of another school division that qualifies for such waiver. However, any waiver granted by the Board of Education pursuant to this subdivision shall only apply to the opening date for those schools where such dependent programs are provided; or

“3. A school division is providing its students, in the school year for which the waiver is sought, with an experimental or innovative program which requires an earlier opening date than that established in subsection A of this section and which has been approved by the Department of Education pursuant to the regulations of the Board of Education establishing standards for accrediting public schools. However, any waiver or extension of the school year granted by the Board of Education pursuant to this subdivision or its standards for accrediting public schools for such an experimental or innovative program shall only apply to the opening date for those schools where such experimental or innovative programs are offered generally to the student body of the school. For the purposes of this subdivision, experimental or innovative programs shall include instructional programs that are offered on a year-round basis by the school division in one or more of its elementary or middle or high schools [the “experimental or innovative” cause].”

⁶2003 Va. Acts ch. 724, at 981.

⁷*See* Bd. of Educ., Meeting Agenda, Item L (Apr. 22, 1010), available at http://www.doe.virginia.gov/boe/meetings/2010/04_apr/agenda_items/item_l.pdf (last visited April 27, 2010).

⁸*City of Roanoke v. James W. Michael’s Bakery Corp.*, 180 Va. 132, 142, 21 S.E.2d 788, 792 (1942).

⁹*Id.* at 143, 21 S.E.2d at 793 (citing *Hunton v. Commonwealth*, 166 Va. 229, 236, 183 S.E. 873, 876 (1936)).

¹⁰*See, e.g.*, 2007 Op. Va. Att’y Gen. 30, 35.

¹¹*Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ 1995 Op. Va. Att’y Gen. 164, 165 (citations omitted).

¹⁵ 1984-85 Op. Va. Att’y Gen. 269, 270.

¹⁶ *Id.*

OP. NO. 10-085

EDUCATION: GENERAL POWERS AND DUTIES OF SCHOOL BOARDS – QUORUM

A vacancy on the school board reduces the number of persons needed to establish a quorum.

THE HONORABLE TERRY G. KILGORE
MEMBER, HOUSE OF DELEGATES
SEPTEMBER 7, 2010

ISSUE PRESENTED

You ask whether the presence of a vacancy on the school board reduces the number of school board members necessary to establish a quorum.

RESPONSE

It is my opinion that because the school board consists of those persons who are “duly appointed or elected,” a vacancy reduces the number of persons who are duly appointed or elected and, therefore, reduces the number of persons necessary to establish a quorum.

BACKGROUND

You relate that a school board is composed of eight members. You further note that there is a current vacancy on the school board.

APPLICABLE LAW AND DISCUSSION

Section 22.1-71 specifies that “the duly appointed or elected members shall constitute the school board.” A school board, therefore, consists of not the total maximum membership of the Board, but rather those persons who have been duly appointed or elected. Section 22.1-73 provides that “[a]t any meeting of a school board a majority of such board shall constitute a quorum.” The term “such board” entails, by definition, those who are “duly appointed or elected.” At present, seven board members are “duly appointed or elected” and these members compose the school board. Therefore, I conclude that, in this circumstance, due to the definition of “school board” found in § 22.1-71, four members constitute a quorum.

CONCLUSION

Accordingly, it is my opinion that because the school board consists of those persons who are “duly appointed or elected,” a vacancy reduces the number of persons who are duly appointed or elected and, therefore, reduces the number of persons necessary to establish a quorum.

OP. NO. 10-010

EDUCATION: PROGRAMS, COURSES OF INSTRUCTION, ETC. – ESTABLISHMENT OF CHARTER SCHOOLS

Provision of charter agreement between City of Richmond School Board and Patrick Henry School of Science requiring Patrick Henry to make the building compliant with Americans with Disabilities Act does not conflict with § 22.1-212.14(D).

THE HONORABLE JOSEPH D. MORRISSEY
MEMBER, HOUSE OF DELEGATES
MARCH 4, 2010

ISSUE PRESENTED

You inquire whether a particular portion of a charter agreement between the School Board of the City of Richmond and the Patrick Henry School of Science is inconsistent with or violates § 22.1-212.14(D).

RESPONSE

It is my opinion that the provision of the charter agreement between the School Board of the City of Richmond and the Patrick Henry School of Science about which you inquire does not conflict with § 22.1-212.14(D).

BACKGROUND

You relate that the School Board of the City of Richmond (“School Board”) and the Patrick Henry School of Science (“Patrick Henry”) have entered into an agreement (the “Agreement”) for a public charter school. You state the Agreement requires Patrick Henry to expend hundreds of thousands of dollars as a precondition to opening its doors in order to make the building compliant with the Americans with Disabilities Act¹ (“ADA”). Further, you note that other schools in the City of Richmond do not bear such a burden. You also note that it is uncommon for a landlord to require the lessee of the premises to make a tenant responsible for making permanent improvements, such as making a building ADA compliant.

APPLICABLE LAW AND DISCUSSION

Article 2, § E(1) of the Agreement requires Patrick Henry to

be responsible for all costs associated with the construction, maintenance and upkeep for the Patrick Henry building for the duration

of the Charter. [Patrick Henry] shall prepare a schedule for bringing the Patrick Henry school building and property into compliance with the Americans with Disabilities Act (ADA) and shall bring the facility into compliance in accordance with the schedule; that schedule shall not cause the School Board to violate the consent decree in the case *Bacon v. City of Richmond*. All costs associated with bringing the facility into compliance with the ADA shall be borne entirely by [Patrick Henry].

Article 1.2, Chapter 13 of Title 22.1, §§ 22.1-212.5 through 22.1-212.16, of the *Virginia Code* governs the establishment of charter schools. Section 22.1-212.14(D) provides, in relevant part, that “[f]unding and service agreements between local school boards and public charter schools shall not provide a financial incentive or constitute a financial disincentive to the establishment of a public charter school, including any regional public charter school.” The prohibition in § 22.1-212.14(D) is narrow and prohibits a financial “disincentive” in the “funding and service agreements” between a local school board and a public charter school. Therefore, even if making a building ADA complaint is a financial impediment or is financially disadvantageous in some way, if this requirement does not relate to the “funding and service agreements,” it is not prohibited by § 22.1-212.14(D).

Section § 22.1-212.14(C) provides further guidance:

Services provided the public charter school by the local school board or the relevant school boards, in the case of regional public charter schools, may include food services; custodial and maintenance services; curriculum, media, and library services; warehousing and merchandising; and such other services not prohibited by the provisions of this article or state and federal laws.

Section E(1) of the Agreement plainly does not infringe upon the prohibition for a financial disincentive with respect to a “service agreement[.]” as that term is used in § 22.1-212.14(D).

Second, as with the “service agreement[.]” the Agreement does not infringe on the prohibition for financial disincentives with respect to the “funding agreement[.]” A funding agreement in this context does not refer to a precondition for opening the doors of the school. Rather, § 22.1-212.14(D) refers to funding agreement between the school board and the charter school after the school has opened. In other words, the “funding agreement” refers to the ongoing operations of the school, not startup costs.² This reading of subsection D of § 22.1-212.14 harmonizes that subsection with subsection (B), which expressly authorizes a school board to state “the conditions for funding the public charter school.” A requirement that Patrick Henry make the building ADA compliant is one of those conditions.³

Finally, you note that other schools in the City of Richmond are not required to make their buildings ADA complaint. I have no reason to dispute this assertion. You also note that it is unusual for a landlord to require a lessee to make a building ADA compliant.

That is also my understanding of standard practice in the real estate industry. Neither fact, however, renders § E(1) incompatible with § 22.1-212.14(D).

CONCLUSION

Accordingly, it is my opinion that the provision of the charter agreement between the School Board of the City of Richmond and the Patrick Henry School of Science about which you inquire does not conflict with § 22.1-212.14(D).

¹ See 42 U.S.C.S. §§ 12131 to 12165 (2009) (Title II of ADA).

² The type of funding agreement that is contemplated by § 22.1-212.14 appears at Appendix E of the Agreement.

³ I note that § 22.1-212.6(C) requires a public charter school to be responsible for its own operations, including contracts for services. Further, § 22.1-212.6(D) provides that “[a]ll other costs for the operation and maintenance of the facilities used by the public charter school shall be subject to negotiation between the public charter school and the school division.” Finally, § 22.1-212.6(A) mandates that public charter schools are subject to all federal and state laws and regulations. Requiring that Patrick Henry be ADA compliant merely ensures that the school meets the federal standards and requirements, specifically, the ADA requirements.

OP. NO. 10-014

EDUCATION: PROGRAMS, COURSES OF INSTRUCTION, ETC. – ESTABLISHMENT OF CHARTER SCHOOLS.

Charter agreement provision between City of Richmond School Board and Patrick Henry School of Science and Arts does not conflict with § 22.1-212.14(D). Insufficient factual background to determine whether disparity in per student funding exists and, if so, whether it would constitute impermissible disincentive.

THE HONORABLE G. MANOLI LOUPASSI

MEMBER, HOUSE OF DELEGATES

APRIL 20, 2010

ISSUE PRESENTED

You inquire whether a specific provision of the charter agreement between the School Board of the City of Richmond and the Patrick Henry School of Science and Arts violates § 22.1-212.14(D). You also ask whether § 22.1-212.14 prohibits the School Board from allocating less funding per student attending the charter school than for other schools in the division.

RESPONSE

It is my opinion that the provision of the charter agreement between the School Board of the City of Richmond and the Patrick Henry School of Science and Arts about which you inquire does not conflict with § 22.1-212.14(D). With respect to your second inquiry, I lack the factual background necessary to determine whether a disparity in funding exists and, if so, whether it would constitute an impermissible disincentive.

BACKGROUND

You provide a copy of the agreement between the School Board of the City of Richmond (“School Board”) and the Patrick Henry School of Science and Arts (“Patrick Henry”) dated October 6, 2008 (“Agreement”), for a public charter school. You relate that the Agreement requires that certain “start-up” costs be paid out of private funds raised by Patrick Henry and not from the per-student state and local funding allocated to Patrick Henry by the School Board. Further, you indicate that the School Board intends to fund Patrick Henry on a per-student allocation that is less than that provided to other schools in the division. Therefore, you inquire whether the Agreement and the per-student allocation would violate § 22.1-212.14.

APPLICABLE LAW AND DISCUSSION

Article 2, § D of the Agreement (“§ D”) requires Patrick Henry to

operate on a financially sound basis under applicable state law, School Board policy, and this Charter Agreement. [Patrick Henry] submitted a detailed budget for school years 2009-2010, 2010-2011, and 2011-2012, which now appears as Appendix E to its supplemented application and which was based on [Patrick Henry] opening for operation on July 27, 2009. Other than startup costs for the library and media center, the principal’s first six months of salary, furnishings, and any identified capital needs, [Patrick Henry] represents that it can operate the school on the state and local funds requested. Funds to cover the start-up costs and for the intended ADA renovations will be derived through tax-deductible contributions as described in the Budget Narrative of the supplemented application. The School Board and/or Richmond Public Schools shall not assume any responsibility for financial liabilities incurred by [Patrick Henry] in excess of budgeted revenues and/or donations received.

Article 1.2, Chapter 13 of Title 22.1, §§ 22.1-212.5 through 22.1-212.16 governs the establishment of charter schools. Section 22.1-212.14(D) provides, in relevant part, that “[f]unding and service agreements between local school boards and public charter schools shall not provide a financial incentive or constitute a financial disincentive to the establishment of a public charter school, including any regional public charter school.” A prior opinion of the Attorney General noted that:

The prohibition in § 22.1-212.14(D) is narrow and prohibits a financial “disincentive” in the “funding and service agreements” between a local school board and a public charter school. Therefore, even if [a term of the agreement between a local school board and a charter school] is a financial impediment or is financially disadvantageous in some way, if this requirement does not relate to the “funding or service agreements,” it is not prohibited by § 22.1-212.14(D).^[1]

Thus, if the term of the Agreement addressing start-up costs does not relate to “funding or service agreements,” it is not prohibited by § 22.1-212.14(D).

Section 22.1-212.14(C) provides guidance regarding matters that are “services” for purposes of charter school funding:

Services provided in the public charter school by the local school board or the relevant school boards, in the case of regional public charter schools, may include food services; custodial and maintenance services; curriculum, media, and library services; warehousing and merchandising; and such other services not prohibited by the provisions of [Article 1.2] or state and federal laws.

Although “*start-up costs* for the library and media center” are among the items addressed in the Agreement, these must be distinguished from “media, and library *services*.”² A funding agreement in this context does not refer to a precondition for opening the doors of the school. Rather, § 22.1-212.14(D) refers to a funding agreement between a school board and a charter school after the school has opened. In other words,³ the “funding agreement” refers to the ongoing operations of the school, not startup costs. Because the startup costs about which you inquire do not relate to either funding or service agreements, it is my opinion that § D of the Agreement does not violate § 22.1-212.14(D).

You also ask whether § 22.1-212.14 prohibits the School Board from providing less funding, on a per-student basis, to Patrick Henry than it does to other schools within the division. Section 22.1-212.14(F) addresses equity in per-student funding:

Notwithstanding any other provision of law, the proportionate share of state and federal resources allocated for students with disabilities and school personnel assigned to special education programs shall be directed to public charter schools enrolling such students. The proportionate share of moneys allocated under other federal or state categorical aid programs shall be directed to public charter schools serving students eligible for such aid.

Section 22.1-212.14(F) does not impose requirements upon the allocation of local funds. Certainly, equal funding per student between a charter school and other public schools within the district would satisfy the mandate that there be no financial disincentive for charter school funding agreements. It is not axiomatic, however, that a per-student funding agreement that is not exactly the same throughout the district would necessarily violate § 22.1-212.14(D). For example, there may be circumstances, such as a significant endowment for a charter school, that would justify a less than equal funding agreement. Conversely, additional funding for a charter school would not necessarily violate the statute. I do not, however, have sufficient facts to determine whether a disparity in funding exists at Patrick Henry or, if it does, whether the disparity would constitute a “disincentive” in a funding agreement.

CONCLUSION

Accordingly, it is my opinion that the provision of the charter agreement between the School Board of the City of Richmond and the Patrick Henry School of Science and Arts

about which you inquire does not conflict with § 22.1-212.14(D). With respect to your second inquiry, I lack the factual background necessary to determine whether a disparity in funding exists and, if so, whether it would constitute an impermissible disincentive.

¹2010 Op. Va. Att’y Gen. No. 10-010, *2, *available at* <http://www.vaag.com/OPINIONS/2010opns/10-010-Morrissey.pdf>.

²VA. CODE ANN. § 22.1-212.14(C) (2006).

³*See* 2010 Op. Va. Att’y Gen., *supra* note 1, at *2.

OP. NO. 10-049

EDUCATION: PUBLIC SCHOOL FUNDS

Board of Supervisors does not have the authority to reduce an appropriation previously made to the school board.

THE HONORABLE R. LEE WARE, JR.

MEMBER, HOUSE OF DELEGATES

NOVEMBER 12, 2010

ISSUE PRESENTED

You ask whether a board of supervisors, by an amendment to its adopted budget, may reduce the amount previously budgeted for the local school fund when the supervisors’ original budget resolution and their subsequent resolution to amend the adopted budget both expressly describe the school fund amount as being “appropriated” in the original budget resolution.

RESPONSE

It is my opinion, based on the facts available to me, that the Board of Supervisors made an appropriation to the School Board and, therefore, did not have the authority to reduce an appropriation previously made.

BACKGROUND

On April 12, 2010, the Powhatan County Board of Supervisors (“Board of Supervisors”) established the tax rates and adopted a Fiscal Year (FY) 2011 budget for the county by a resolution which stated, in relevant part, “[t]he amount hereby approved for the School Fund is \$42,007,557 and is appropriated lump sum.” Other items listed in this resolution do not contain the language “is appropriated lump sum.” On May 10, 2010, the Board of Supervisors adopted a “resolution to amend the FY11 adopted budget.” In this resolution, the Board of Supervisors noted that “the total amount appropriated to the School Fund for FY11 was \$42,007,557” The Board of Supervisors observed that it had “implored the School Board to minimize the salary reductions.” The Board of Supervisors further stated that the School Board had “placed \$123,213 in a contingency line for distribution at a later time and did not utilize these surplus funds for any relief related to the salary reductions.” The Board of Supervisors “resolved [that it was]

amending the School Board adopted FY11 budget from 42,007,557 to 41,884,344” – a reduction of \$123,213. Finally, on June 14, 2010, the Board of Supervisors adopted a “resolution appropriating the fiscal year 2011 budget”, providing that “[t]he amount approved for the School Fund is \$41,884,928.” This June 14, 2010, resolution appears to be a departure from the usual practice of the Board of Supervisors; a review of the official minutes for that governing body found no evidence that the Board of Supervisors had adopted an appropriation resolution separate from its annual budget resolution in 2009, 2008, or 2007.

APPLICABLE LAW AND DISCUSSION

School budgets involve a division of responsibility between the governing board of a locality and the school board. The superintendent of each public school division is tasked with preparing an “estimate of the amount of money deemed to be needed during the next fiscal year for the support of the public schools of the school division.”¹ The estimate must list the amounts proposed as necessary according to each “major classification prescribed by the Board of Education and such other headings or items as may be necessary.”² The local school board must hold at least one public hearing on the proposed budget prior to giving final approval of the budget for submission to the governing body of the locality.³ The governing body must then prepare and approve the annual educational budget within a statutory timeframe.⁴ The governing body may approve a budget that differs from that submitted by the school board.⁵

In the counties of the Commonwealth, boards of supervisors exercise fiscal control through two distinct processes, budgeting and appropriations. Budgeting is a planning process, required by the General Assembly, to anticipate revenue needs and to make decisions about the priority of programs and level of services to be provided.⁶ Budgets adopted by local governing bodies, therefore, are for planning and informative purposes and are statutorily distinguished from appropriations.⁷ The appropriations process is the mechanism by which funds are made available for spending on those programs and operations the governing body has decided to support. Adoption of a budget that contemplates certain expenditures does not automatically result in the expenditure of money for that purpose. “Approval of the budget . . . is not an appropriation. The formal act of appropriation by the governing body actually sets aside money for a specific use.”⁸

The governing body has flexibility in the timing of its appropriations to the school board; it may make its appropriations on the same periodic basis – annually, semiannually, quarterly, or monthly – as it appropriates funds to other departments and agencies.⁹ Once funds are appropriated, however, the governing body is without authority to reduce the appropriation without the consent of the school board.¹⁰ As prior Opinions have noted, this does not leave a governing body without the power to affect educational expenditures: “It may make appropriations on a periodic basis, or appropriate school funds for basic costs only, while establishing a contingency fund for nonessential expenditures. Alternatively, it may in its appropriation increase or decrease the budgeted amounts for major classifications proposed by the school board.”¹¹

Once funds are appropriated to it, the school board has the authority to determine how the funds will be spent, “consistent with law and the local appropriation.”¹² The school

board may shift appropriations within the major classifications,¹³ but may not transfer funds from one classification to another.¹⁴

The question to be resolved is whether the Board of Supervisors adopted a budget without making any appropriation to the School Board on April 12, 2010, or whether it appropriated funds to the School Board. If it is the latter, the Board of Supervisors could not reduce the prior appropriation on May 10, 2010. Based on the facts that are available to me, I conclude that the Board of Supervisors appropriated the funds to the School Board on April 12, 2010. The April 12, 2010 resolution states that the amount approved for the School Fund “is appropriated lump sum.”¹⁵ The May 10, 2010, resolution by which the Board of Supervisors sought to reduce this amount states that “the total amount appropriated to the School Fund [on April 12, 2010] for FY11 was \$42,007,557.” Thus, the express language of the May 10, 2010, resolution confirms that the Board of Supervisors intended to, and did, appropriate the school fund amount on April 12, 2010. Having appropriated the funds and not merely budgeted the funds, the Board of Supervisors subsequently could not withdraw those funds from the School Board on May 10, 2010.

CONCLUSION

Accordingly, it is my opinion, based on the facts available to me, that the Board of Supervisors made an appropriation to the School Board and, therefore, did not have the authority to reduce an appropriation previously made.

¹ VA. CODE ANN. § 22.1-92(A) (2006).

² *Id.* The major classifications for expenditures are: “(i) instruction, (ii) administration, attendance and health, (iii) pupil transportation, (iv) operation and maintenance, (v) school food services and other noninstructional operations, (vi) facilities, (vii) debt and fund transfers, (viii) technology, and (ix) contingency reserves.” Section 22.1-115 (Supp. 2010). The Board of Education has adopted by regulation the same classifications. *See* 8 VA. ADMIN. CODE § 20-210-10.

³ VA. CODE ANN. § 22.1-92(B) (2006).

⁴ Section 22.1-93 (Supp. 2010).

⁵ *See* Scott County Sch. Bd. v. Scott County Bd. of Supvrs., 169 Va. 213, 217, 193 S.E. 52, 54 (1937) (“General Assembly intended for the board of supervisors to curtail the school budget if in the exercise of a reasonable discretion it thought the budget excessive”). *See also* 1979-1980 Op. Va. Att’y Gen. 300, 301 (“if the board of supervisors has not made its appropriation of funds for school purposes, the board would have the discretion to reduce the school budget to the level required by the Standards of Quality”).

⁶ *See* VA. CODE ANN. §§ 15.2-2500 to 15.2-2508 (2008 & Supp. 2010).

⁷ *See* § 15.2-2506 (Supp. 2010) (“In no event, including school division budgets, shall such preparation, publication and approval [of the budget] be deemed to be an appropriation”). *See also* 1979-1980 Op. Va. Att’y Gen. 300, 301 (“The mere approval of the budget would not necessarily operate as an appropriation”).

⁸ 1982-83 Op. Va. Att’y Gen. 16, 16 (citing *Almond v. Day*, 197 Va. 419, 426, 89 S.E.2d 851, 855 (1955)). *See also* § 22.1-94 (2006).

⁹ *Id.* *See also* § 15.2-2506 (“No money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the governing body”).

¹⁰ *See* Bd. of Supvrs. of Chesterfield County v. County Sch. Bd. of Chesterfield County, 182 Va. 266, 281, 28 S.E.2d 698, 705 (1944) (“After the board of supervisors have (sic) appropriated money for schools, the exclusive right to determine how this money shall be spent is in the discretion of the school board, so long as

they stay within the limits set up in the budget”); 1979-1980 Op. Va. Att’y Gen. 122 (“once the appropriation is made, the funds automatically vest within the exclusive dominion of the school board, and the county would have no authority to otherwise divert such funds for any other purpose without the consent of the county school board”).

¹¹ 1980-81 Op. Va. Att’y Gen. 33, 34 (citations omitted).

¹² 1981-82 Op. Va. Att’y Gen. 323, 323.

¹³ *Id.* at 324.

¹⁴ 1980-81 Op. Va. Att’y Gen. at 34.

¹⁵ See 1959-1960 Op. Va. Att’y Gen. 66, 70 (“If the county board makes a lump sum appropriation and includes in its resolution making such appropriation language broad enough to meet the requirements of the terminal sentence of [predecessor statute to § 15.2-2506 containing nearly identical terminal sentence requiring an appropriation by the governing body before money shall be paid out], such will be sufficient”).

OP. NO. 10-016

EDUCATION: PUPIL TRANSPORTATION – GENERAL PROVISIONS.

Local school board may not charge fee for transportation of students enrolled in specialty program located outside boundaries of student's base school.

THE HONORABLE JACKSON H. MILLER

MEMBER, HOUSE OF DELEGATES

MARCH 18, 2010

ISSUES PRESENTED

You ask whether a local school board may charge a fee for the transportation of a student who voluntarily enrolls in a nonrequired specialty program located outside the boundaries of the student’s “base school.”¹ You also ask whether a school board may charge a transportation fee for a majority of its specialty programs and provide free transportation for certain select programs.

RESPONSE

It is my opinion that a local school board may not charge a fee for the transportation of a student enrolled in a specialty program located outside the boundaries of the student’s base school.²

BACKGROUND

You relate that Prince William County Public Schools (“PWCS”) offers students the opportunity to enroll in a number of specialty programs that are located throughout the school division and in a neighboring school division. You note that these programs are voluntary and offer the standard curriculum as well as supplemental or complementary educational opportunities. For some students, the specialty program may be offered at their base school. These students rely on the ordinary means of school transportation. You note, however, that some students attend specialty programs at locations outside the boundaries of their base schools. You relate that PWCS provides free transportation for these students via a network of express bus stops. You note, however, that parents are responsible for a student’s transportation between home and the express stop.

As a result of budget considerations, you state that PWCS plans to discontinue free transportation to all but three specialty programs, including the Governor's School in Fairfax County. You note that if PWCS discontinues the free transportation to the Governor's School, the number of PWCS students who attend the program would decrease due to the travel distance involved.

You state that PWCS proposes to continue free transportation to certain traditional programs offered to students across the county. You relate that should such free transportation be discontinued, a number of consequences would follow: (1) the closing or repurposing of the buildings; (2) staff transfers or layoffs; and (3) the absorption of students into their base schools, possibly resulting in overcrowding.

APPLICABLE LAW AND DISCUSSION

The Constitution of Virginia mandates that the General Assembly "provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth."³ In response, the General Assembly has provided that "[t]he public schools in each school division shall be free to each person of school age who resides within the school division."⁴ Further, local school boards are not permitted to levy fees or charges on any pupil except as provided in Title 22.1 or by regulation of the State Board of Education ("State Board").⁵

Section 22.1-176(A) authorizes local school boards to provide transportation for the pupils they serve, but does not expressly require such transportation, except in one instance. Section 22.1-221(A) requires school boards to provide free transportation to students with disabilities so they may "obtain the benefit of educational programs and opportunities."

Although the transportation of pupils (other than students with disabilities) is optional, the General Assembly has authorized school boards to charge fees for such transportation in only one circumstance:

When a school board provides transportation to pupils for extracurricular activities, other than those covered by an activity fund, which are sponsored by the pupils' school apart from the regular instructional program and which the pupils are not required to attend or participate in, the school board may accept contributions for such transportation or charge each pupil utilizing such transportation a reasonable fee not to exceed his pro rata share of the cost of providing such transportation.^[6]

The General Assembly has not defined the term, "extracurricular"; therefore, it must be given its ordinary meaning.⁷ "Extracurricular" means "outside a regular curriculum: not falling within the scope of a regular curriculum ... connected with the students' school and usu. carrying no academic credit."⁸ This definition is consistent with the meaning ascribed to it by the State Board of Education.⁹ Although the specialty programs you describe offer supplemental or complementary educational opportunities, I assume that such program opportunities are interwoven with the standard mandatory curriculum and

are not separate, optional components that augment a student's instructional day or diploma requirements. In addition, although enrollment in the specialty program is optional, a student participating in the program is subject to the Commonwealth's compulsory attendance laws.¹⁰ As such, the educational opportunities may not be characterized as "extracurricular" such that the school board may charge a fee for transportation. Accordingly, it is my opinion that § 22.1-176 does not authorize a local school board to charge a transportation fee for a student enrolled in a specialty program.¹¹

Local school boards may charge fees in accordance with regulations of the State Board.¹² The State Board has authorized fees for "voluntary student activities" and provides that a local school board is not prohibited "from making supplies, services, or materials available to pupils at cost. Nor is it a violation to make a charge for a field trip or an educational related program that is not a required activity."¹³ A prior opinion of the Attorney General has examined whether transportation to and from school might be a "service" for which school boards could charge and concluded that bus transportation to and from school is not a "service" within the meaning of the regulation.¹⁴

CONCLUSION

Accordingly, it is my opinion that a local school board may not charge a fee for the transportation of students enrolled in a specialty program located outside the boundaries of the student's base school.¹⁵

¹For purposes of this opinion, a "base school" is a school within which designated school boundaries a student resides.

²Because I answer your first inquiry in the negative, there is no need to address your second question.

³VA. CONST. art. VIII, § 1.

⁴VA. CODE ANN. § 22.1-3(A) (2006).

⁵See § 22.1-6 (2006).

⁶Section 22.1-176(B).

⁷See *Sansom v. Bd. of Supvrs.*, 257 Va. 589, 594-95, 514 S.E.2d 345, 349 (1999); *Commonwealth v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980).

⁸WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 806 (1993).

⁹See, e.g., 8 VA. ADMIN. CODE 20-131-200(A) (Supp. 2009) ("Extracurricular activities must be organized to avoid interrupting the instructional program. Extracurricular activities shall not be permitted to interfere with the student's required instructional activities.").

¹⁰See § 22.1-254(A) (2006).

¹¹See 1987-88 Op. Va. Att'y Gen. 337, 338 (concluding that there is no requirement that school division provide tuition and transportation for students attending "magnet" school). Tuition and transportation matters are reserved to the cooperative agreement of the participating divisions. *Id.* Participating school divisions may, absent an agreement to the contrary, decide to enroll and pay for fewer than the number of students for whom slots are available or withdraw from the "magnet" program before its students complete the program. *Id.*

¹²See *supra* note 5 and accompanying text.

¹³8 VA. ADMIN. CODE § 20-370-10 (2002).

¹⁴See 2007 Op. Va. Att'y Gen. 82, 84 (interpreting § 22.1-176 and 8 VAC § 20-370-10).

¹⁵See *supra* note 2.

OP. NO. 10-118

EDUCATION: SCHOOL DIVISIONS, JOINT SCHOOLS AND CONTRACTS BETWEEN SCHOOL DIVISIONS—SCHOOL CONSOLIDATION

School board is solely responsible for deciding whether and how to consolidate schools. Board of Supervisors may not instruct school board on the decision.

THE HONORABLE G. MANOLI LOUPASSI
MEMBER, HOUSE OF DELEGATES
APRIL 20, 2010

ISSUE PRESENTED

You inquire whether a county board of supervisors can instruct a school board how to consolidate its schools.

RESPONSE

It is my opinion that a school board is solely responsible for the decision whether and how to consolidate schools, and a county board of supervisors may not instruct the school board to consolidate schools or how to consolidate schools.

BACKGROUND

You indicate that the Board of Supervisors of Wise County has enacted a resolution to fund Wise County High Schools. The resolution provides in part that

The majority of Wise County Board of Supervisors, as an alternative to the current plan, accordingly commits the sum of (\$69M) Sixty-Nine million for a plan of consolidation that supports the construction of two new schools on one site that would service all existing high schools with the exception of St. Paul High School, which would be converted to a K-12 school model, with the new facilities to be located within 4 to 5 mile radius of Highways 23 and 58 and 8th grade stays at Appalachia Elementary.

In response, the School Board voted a motion stating that

In an effort to increase the efficiency of the school division, to improve the curriculum offering for all students, and to improve the instructional program, I move that we consider this 2 on 1 site proposal, as presented here tonight, as a proposed plan of consolidation and that we direct the Superintendent to establish a public hearing for community consideration of both proposed plans of consolidation on November 29, 2010 at the J. J. Kelly auditorium at 7:00 p.m. and that immediately thereafter we vote whether to accept one of the proposed plans as our plan of consolidation.

APPLICABLE LAW AND DISCUSSION

Article VIII, § 7 of the Constitution of Virginia and § 22.1-28 of the *Code of Virginia* provide that “[t]he supervision of schools in each school division shall be vested in a school board.” By statute, school boards are given the responsibility to, among other things, “[p]rovide for the consolidation of schools.”¹

A county’s funding for a county’s schools is determined by the county board of supervisors.² The board of supervisors may make its appropriation for the schools as a lump sum, or it may appropriate the funds based upon major classifications.³ A board of supervisors, however, may not issue specific binding instructions regarding how the appropriated funds are to be spent within those categories.⁴ If the board of supervisors has appropriated funds based upon the prescribed classifications, “[t]he school board may not transfer appropriated funds from one classification to another, but within the major classifications of appropriated funds it has discretion in deciding how monies will be spent.”⁵ In addition, not only is the authority for school consolidation expressly vested with the school board, but also the authority to manage and construct school property rests with the school board.⁶

In light of the exclusive authority of the school board to provide for consolidation of schools, and the limited authority of a board of supervisors with respect to school funding, a board of supervisors may not control through its appropriation of funds a school board’s decision whether and how to consolidate schools in a particular county. A board of supervisors, nonetheless, is free to express its desire concerning how certain funds should be spent. Therefore, the Board in this instance can recommend the adoption of a particular plan for school consolidation. Such recommendations, however, “have no controlling effect upon the school board”⁷ because the ultimate responsibility for a plan of school consolidation rests with the school board.

CONCLUSION

Accordingly, it is my opinion that a school board is solely responsible for the decision whether and how to consolidate schools, and a county board of supervisors may not instruct the school board to consolidate schools or how to consolidate schools.

¹ See, e.g., VA. CODE ANN. § 22.1-79 (Supp. 2010).

² Section 22.1-94 (2006).

³ *Id.* Those classifications include “(i) instruction, (ii) administration, attendance and health, (iii) pupil transportation, (iv) operation and maintenance, (v) school food services and other noninstructional operations, (vi) facilities, (vii) debt and fund transfers, (viii) technology, and (ix) contingency reserves.” Section 22.1-115 (Supp. 2010).

⁴ *Bd. of Supvrs. v. Cnty. Sch. Bd.*, 182 Va. 266, 28 S.E.2d 698 (1944) (Although County Board of Supervisors can determine the budget of the School Board, it may not include a specific line item for teacher’s salaries); see also 1975-76 Op. Va. Att’y Gen. 22, 23 (“The board of supervisors may not fund individual line items, nor may it alter individual line items, either by way of an increase or a reduction.”).

⁵ 1980-81 Op. Va. Att’y Gen. 33, 34.

⁶ Thus, a board of supervisors may not wrest from the school board the authority to provide for the construction and furnishing of school buildings. 1997 Op. Va. Att’y Gen. 55, 56. Furthermore, “the board of supervisors has no authority to require the school board to declare its unused real estate as surplus property.” 1987-88 Op. Va.

Att’y Gen. 339, 339. Moreover, “[i]t is the responsibility of the local school board to select and purchase a site upon which a public school shall be located.” 1976-77 Op. Va. Att’y Gen. 237, 238. Nor must the school board accept the recommendation of the board of supervisors that it contract with an insurance provider designated by the board of supervisors. 1972-73 Op. Va. Att’y Gen. 30. Finally, this Office has concluded that “the authority to determine whether or not the [school] property in question should be sold or retained is vested in the local school board.” 1968-69 Op. Va. Att’y Gen. 209, 209.

⁷ 1980-81 Op. Va. Att’y Gen. 33, 34.

OP. NO. 10-104

ELECTIONS: ABSENTEE VOTING-“DEAD MAN VOTING”

Generally, when an absentee ballot dies prior to election day, but after having voted by absentee ballot, the absentee ballot should not be counted, but in those cases where ballots are cast in a manner by which a ballot can no longer be cast aside, election officials are not required to perform the impossible task of not counting the deceased voter’s ballot.

MR. ROBIN R. LIND

SECRETARY, GOOCHLAND COUNTY ELECTORAL BOARD

OCTOBER 26, 2010

ISSUE PRESENTED

You ask whether an absentee ballot shall be counted when that absentee ballot was properly cast by a qualified voter who then dies before election day.

RESPONSE

It is my opinion that, when a general registrar knows that an absentee voter has died prior to election day, but after having voted by absentee ballot, the registrar must cancel that voter’s registration, and the absentee ballot should not be counted; but that in those circumstances in which absentee ballots are cast prior to election day in a manner by which the absentee ballot no longer can be set aside, the general registrar who knows of the voter’s death shall cancel that voter’s registration, but election officials are not otherwise required to perform the impossible task of not counting the deceased voter’s absentee ballot.

APPLICABLE LAW AND DISCUSSION

Pursuant to § 24.2-700, a registered voter meeting one of the eligibility requirements of that section may request an absentee ballot in any election in which he or she is qualified to vote. Section 24.2-707 provides two methods by which an eligible voter may vote by absentee ballot: by mail or in person. Specifically, an absentee voter either may (1) send a completed absentee ballot application to the general registrar’s office and, after receiving the official printed ballot from the electoral board, mark the ballot in the presence of a witness, enclose the ballot in the designated envelope in accordance with the instructions provided, and return the ballot to the electoral board by mail to be counted on election day; or may (2) appear in person at the office of the general registrar (or at another location approved by the electoral board) to complete the application

procedures and, if the official ballot is then available and the jurisdiction uses a central absentee voting precinct, cast the absentee ballot on voting equipment provided by the Electoral Board.

Section 24.2-711, which prescribes the duties of election officers with respect to absentee ballots, provides:

After the close of the polls, the container of absentee ballots shall be opened by the officers of election. As each ballot envelope is removed from the container, the name of the voter shall be called and checked as if the voter were voting in person. If the voter is found entitled to vote, an officer shall mark the voter's name on the pollbook with the first or next consecutive number from the voter count form, or shall enter that the voter has voted if the pollbook is in electronic form. The ballot envelope shall then be opened, and the ballot deposited in the ballot container without being unfolded or examined. *If the voter is found not entitled to vote, the unopened envelope shall be rejected.* A majority of the officers shall write and sign a statement of the cause for rejection on the envelope or on an attachment to the envelope.¹

The counting of absentee ballots at the close of regular balloting has long been the practice in Virginia.² A printed absentee ballot delivered to the electoral board by mail or by the voter in person is deemed to be cast on the day of the election.³ The casting of such an absentee ballot takes place when the officers of election, following the steps set forth in § 24.2-711, open the ballot envelope and deposit the ballot in the ballot container after having satisfied themselves that the person who submitted the absentee ballot is a qualified voter entitled to vote in the election. In *Moore v. Pullem*, the Supreme Court of Virginia held that before a vote could be counted, it is the duty of the election officials to:

ascertain whether each of the persons whose ballots [are] so offered had been properly registered, and then whether they had qualified themselves to vote at that election . . . and also to consider every other fact which might have then appeared to show that the person was not a qualified voter. For instance, if it then appeared that he had been convicted of a crime, *or if in the interval he had died*, of course, the ballot could not have been legally deposited or counted as a valid vote.⁴

Thus, a person who is deceased on election day cannot vote, and the absentee ballot of any such person should not be cast and counted.⁵ Section 24.2-427 mandates that the “general registrar shall cancel the registration of (i) all persons known by him to be deceased”⁶ A person whose registration to vote has been cancelled cannot vote, and his vote should not be counted.⁷ Accordingly, an absentee ballot of a person known to be deceased shall not be cast and counted on election day.

Virginia law, however, permits certain absentee ballots to be cast prior to election day. Section 24.2-707 expressly provides that “[t]he electoral board of any county or city using a central absentee voting precinct may provide for the casting of absentee ballots on voting equipment prior to election day by applicants who are voting in person” and that

“procedures shall provide for the casting of absentee ballots prior to election day by in-person applicants on voting equipment which has been certified, and is currently approved, by the State Board.”⁸ Section 24.2-709.1 further permits an electoral board to authorize its general registrar to use alternative procedures to expedite counting absentee ballots capable of being read by optical scan counting equipment by casting those ballots through the optical scanner, without initiating ballot count totals.

The General Assembly adopted these two provisions for important public policy reasons, namely to make in-person absentee voting more convenient for voters and to ease the administrative burden on local election officials responsible for processing absentee ballots. Both sections require election officials to follow procedures intended to verify that the voter is qualified to vote in that election before the absentee ballot is cast. Once an absentee ballot has been cast on voting equipment, however, it is no longer capable of being set aside on election day.⁹ Although a voter who dies before election day no longer is a qualified voter for that election, election procedures implemented for other important public policy reasons may result in the absentee ballot of such a voter being cast on voting equipment before election day, leaving election officials with no ability to set aside the ballot so that it is not counted.

In cases of in-person voting on machines, there is no way to distinguish one electronic “secret” vote from others cast on the equipment, so the absentee vote will be counted. When a printed absentee ballot is processed, however, because the general registrar cancels a deceased voter’s registration, the voter’s name will not be found on the pollbook and the vote will not be counted. As you note, there is thus a different outcome of how an absentee vote will be treated based on the method of voting chosen.

CONCLUSION

Accordingly, it is my opinion that, when a general registrar knows an absentee voter has died prior to election day, but after having voted by absentee ballot, the registrar must cancel that voter’s registration, and the absentee ballot should not be counted; but that in those circumstances in which absentee ballots are cast prior to election day in a manner by which the absentee ballot no longer can be set aside, the general registrar who knows of the voter’s death shall cancel that voter’s registration, but election officials are not otherwise required to perform the impossible task of not counting the deceased voter’s ballot.

¹ Section 24.2-711 (2006) (emphasis added).

² See, e.g., *Moore v. Pullem*, 150 Va. 174, 183, 142 S.E. 415, 417 (1928) (“at the close of the regular balloting on the day of the election,” the absentee votes shall be counted) (construing the predecessor to the current absentee voting statutes). But see § 24.2-709.1 (Supp. 2010) (electoral board may authorize general registrar to use alternative procedures prior to election day to expedite counting of absentee ballots capable of being read by an optical scan counting device so long as ballot count totals are not initiated).

³ See 1959-60 Op. Va. Att’y Gen. 142, 142-43 (an absentee ballot mailed to the electoral board “is not deemed to be actually cast until the day of election”). See also §§ 24.2-600 through 24.2-687, setting forth the methods by which votes are cast on election day and how they are counted.

⁴ *Moore*, 150 Va. at 199, 183 S.E. at 422 (emphasis added).

⁵ *Id.*; see also 1959-1960 Op. Va. Att’y Gen. at 143 (the mailed absentee ballot of a voter who died before election day should not be counted).

⁶ Section 24.2-427(B) (Supp. 2010).

⁷ See §§ 24.2-427 (Supp. 2010) and 24.2-643 (2006).

⁸ *Id.*

⁹ The General Assembly has recognized that once a ballot is cast it may not be possible to set it aside if officers of election later determine that the ballot is invalid *See, e.g.*, § 24.2-663 (2006) (“If any person votes, either in person or absentee, more than one time in an election, all ballots received from such person shall be void and, *if possible*, not counted. If one such ballot has already been cast, any additional ballots received from such person shall be void and not counted”) (emphasis added).

OP. NO. 10-005

ELECTIONS: CAMPAIGN FUNDRAISING; LEGISLATIVE SESSIONS — CAMPAIGN FINANCE DISCLOSURE ACT OF 2006

§ 24.2-954 precludes General Assembly members from engaging in fundraising activity in connection with campaign for *state office* during regular session of General Assembly; prohibition does not restrict fundraising activity related to campaign for *federal office*. Federal law preempts Virginia's fundraising prohibition when General Assembly member solicits or accepts contributions solely for federal office.

THE HONORABLE ROBERT HURT
MEMBER, SENATE OF VIRGINIA
JANUARY 25, 2010

ISSUES PRESENTED

You ask whether § 24.2-954 prohibits a member of the General Assembly from soliciting or accepting campaign contributions for his federal campaign committee during a regular session of the General Assembly.¹ You further inquire whether federal law would preempt § 24.2-954 when a member of the General Assembly is raising the funds as part of a campaign for federal office.

RESPONSE

It is my opinion that § 24.2-954 precludes members of the General Assembly from engaging in fundraising activity in connection with a campaign for *state office* during a regular session of the General Assembly. However, it is my further opinion that such prohibition does not restrict fundraising activity related to a campaign for *federal office*. Finally, it is my opinion that federal law preempts Virginia’s fundraising prohibition when a General Assembly member solicits or accepts contributions solely for a federal office.

APPLICABLE LAW AND DISCUSSION

As you note, there are overlapping state and federal laws on the questions you present. Turning first to state law, under a well-established principle of statutory construction, § 24.2-954 must be read together with the Campaign Finance Act of 2006² (“2006 Act”), rather than in isolation.³

Section 24.2-954(A) provides that:

No member of the General Assembly or statewide official and no campaign committee of a member of the General Assembly or statewide official shall solicit or accept a contribution for the campaign committee of any member of the General Assembly or statewide official, or for any political committee, from any person or political committee on and after the first day of a regular session of the General Assembly through adjournment sine die of that session.

Section 24.2-945.1(A) of the 2006 Act defines a “campaign committee” as “the committee designated by *a candidate* to receive all contributions and make all expenditures for him or on his behalf in connection with his nomination or election.” (Emphasis added.) A “candidate” is “a person who seeks or campaigns for an office *of the Commonwealth or one of its governmental units*.”⁴ Additionally, § 24.2-954(B) provides that:

No person or political committee shall make or promise to make a contribution to a member of the General Assembly or statewide official or his campaign committee on and after the first day of a regular session of the General Assembly through adjournment sine die of that session.

For purposes of § 24.2-954, the term “solicit” means to “request a contribution, orally or in writing, but shall not include a request for support of a candidate or his position on an issue.”⁵

I conclude that in enacting § 24.2-954(A), the intent of the General Assembly was to prohibit fundraising during a regular session of the General Assembly by persons running for state office. The General Assembly did not prohibit all fundraising. Instead, it targeted specific fundraising activities directed at a campaign committee. A “campaign committee” is “the committee designated by *a candidate*,” which is a person who seeks or campaigns for a state office,⁶ “to receive all contributions and make all expenditures for him or on his behalf in connection with his nomination or election.”⁷ Therefore, if the fundraising does not occur “for an office of the Commonwealth,” the prohibition in § 24.2-954(A) would not apply. This conclusion is supported by other statutes regulating elections, which demonstrate a consistent intent by the General Assembly for these laws to apply to candidates for state and local offices, not candidates for federal office.⁸ Thus, § 24.2-954 does not apply to fundraising activities by a General Assembly member in connection with a campaign for federal office. In the facts you present, a person who is campaigning for the United States House of Representatives is not seeking an office “of the Commonwealth or one of its governmental units.” For the same reason, I must

conclude that § 24.2-954(B) does not prohibit a contribution to the campaign committee of a candidate for federal office.

The analysis, however, does not end with § 24.2-954 because federal law regulates campaigns for federal office. The Federal Election Campaign Act of 1971⁹ (“FECA”) provides that “the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.”¹⁰ The Federal Election Commission (“FEC”) has promulgated regulations that address fundraising, specifically providing that “[f]ederal law supersedes State law concerning the ... [l]imitation on contributions and expenditures regarding Federal candidates and political committees.”¹¹ I find no restriction under federal law that would prevent a member of the General Assembly from soliciting or accepting contributions during a regular session of the General Assembly.

The FEC has not construed § 24.2-954. However, the FEC has issued an advisory opinion concluding that FECA preempted a Georgia statute, similar to Virginia’s, that prohibited fundraising by a member of the Georgia General Assembly when it was in session.¹² The United States Court of Appeals for the Eleventh Circuit reached the same conclusion with respect to this Georgia statute.¹³ Further, the FEC consistently has concluded in other contexts that federal law preempts state law restrictions on fundraising by candidates for federal office.¹⁴

Under the Supremacy Clause¹⁵ of the Constitution of the United States, when a state law conflicts with a federal law that the federal government had proper constitutional authority to promulgate, state law must give way.¹⁶ In light of the clear language of FECA, its regulations, its consistent interpretation by the FEC, and persuasive precedent from the Eleventh Circuit, it is my opinion that FECA would preempt § 24.2-954 insofar as it restricts a member of the General Assembly, during a session of the General Assembly, from soliciting or accepting funds for a campaign related to a federal office.

CONCLUSION

Accordingly, it is my opinion that § 24.2-954 precludes members of the General Assembly from engaging in fundraising activity in connection with a campaign for *state office* during a regular session of the General Assembly. However, it is my further opinion that such prohibition does not restrict fundraising activity related to a campaign for *federal office*. Finally, it is my opinion that federal law preempts Virginia’s fundraising prohibition when a General Assembly member solicits or accepts contributions solely for a federal office.

¹For purposes of this opinion, the phrase “regular session of the General Assembly” means “on and after the first day of a regular session of the General Assembly through adjournment sine die of that session.” VA. CODE ANN. § 24.2-954(A) (2006).

²See VA. CODE ANN. tit. 24.2, ch. 9.3, §§ 24.2-945 to 24.2-953.5 (2006 & Supp. 2009).

³See *Alston v. Commonwealth*, 274 Va. 759, 769, 652 S.E.2d 456, 462 (2007) (noting cardinal rule of statutory construction that statutes dealing with specific subject must be construed together to arrive at object sought to be accomplished).

⁴Section 24.2-101 (Supp. 2009) (emphasis added); see also § 24.2-945.1(A) (Supp. 2009) (referring to

§ 24.2-101 for definition of “candidate”).

⁵Section 24.2-954(D) (2006).

⁶See *supra* note 4 and accompanying text.

⁷Section 24.2-945.1(A).

⁸See § 24.2-945(A) (Supp. 2009) (exempting candidates for United States Congress from 2006 Act); § 24.2-947.1(A) (Supp. 2009) (requiring that statements of organization be filed only for individuals “seeking or campaigning for an office of the Commonwealth or one of its governmental units”); see also § 24.2-502 (2006) (requiring that statements of economic interests be filed by candidates for state or local office).

⁹See Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections, as amended, at 2 U.S.C. §§ 431 to 457).

¹⁰2 U.S.C.S. § 453(a) (LexisNexis Supp. 2009).

¹¹11 C.F.R. § 108.7(b)(3) (2009).

¹²See Adv. Op. Fed. Election Comm’n 1995-48 (1996), available at http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE_NO=-1 (search for 1995-48). Drawing from the text and the legislative history of the statute, the FEC concluded that the FECA “‘occup[ies] the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated.’” *Id.* (quoting H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974)). Therefore, notwithstanding state law to the contrary, a member of the Georgia General Assembly who was also a candidate for the United States Senate could accept contributions during the period the Georgia legislature is in session. *Id.*

¹³See *Teper v. Miller*, 82 F.3d 989 (11th Cir. 1996) (upholding preliminary injunction enjoining application of Georgia statute as preempted by FECA).

¹⁴See Adv. Op. Fed. Election Comm’n: 1994-2 (1994), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=966> (search for 1994-02) (concluding that FECA preempts Minnesota statute barring lobbyists from contributing to candidate during regular session of state legislature); 1993-25 (1994), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=966> (search for 1993-25) (advising that FECA preempts Wisconsin statute restricting time period during which lobbyists can contribute to candidates); 1992-43 (1993), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=966> (search for 1992-43) (concluding that FECA preempts Washington statute barring state officials from accepting campaign contributions during legislative sessions).

¹⁵U.S. Const. art. VI, cl. 2.

¹⁶See, e.g., *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993).

OP. NO. 10-046

ELECTIONS: CONDUCT OF ELECTIONS; ELECTION RESULTS—ASSISTANCE FOR CERTAIN VOTERS

An election officer is not required to be posted continuously outside the polling station to assist voters. Legal duty to assist is triggered only open receipt of a request for assistance.

MR. G. WILLIAM THOMAS
SECRETARY, ELECTORAL BOARD
CITY OF RICHMOND
OCTOBER 28, 2010

ISSUES PRESENTED

You ask whether federal or state law requires that an officer of election be posted outside the polling place at all times that the polls are open in order to implement curbside voting. You also ask whether the legal requirements of curbside voting are satisfied if the

voter who wishes to vote curbside is required either to i) go inside the polling place themselves to alert the officers of election that he wishes to vote curbside; ii) send another party inside the polling place to alert the officers of election that the voters wishes to vote curbside; or iii) call ahead to inform election officials of his preference. Finally, in the event that the answer to both your first and second questions is no, you ask whether there are other actions required by law to be taken regarding notice to officers of election that an individual wishes to vote curbside, and who must take such actions.

RESPONSE

It is my opinion that neither Virginia nor federal law requires an officer of election to be posted outside a polling place at all times the polls are open on election day in order to assist elderly and disabled voters who prefer to vote outside the polling place pursuant to § 24.2-649, a procedure commonly known as “curbside voting.” It further is my opinion that the legal requirement for officers of election to assist such voters with curbside voting is triggered upon the voter making a request for such service, either by (i) entering the polling place to alert the officers of election, (ii) sending another person inside the polling place to alert the officers of election, or (iii) communicating with election officials in advance of coming to the polling place.¹

APPLICABLE LAW AND DISCUSSION

Section 24.2-649 of the *Virginia Code* sets forth the circumstances in which assistance may be provided to certain voters in the election process. Section 24.2-649(A), which governs curbside voting procedures, provides:

Any voter age 65 or older or physically disabled may request and then shall be handed a paper ballot or a mark sense ballot by an officer of election outside the polling place but within 150 feet of the entrance to the polling place. The voter shall mark the paper ballot in the officer’s presence but in a secret manner and fold and return the ballot to the officer. The officer shall immediately return to the polling place and deposit the ballot in the ballot container in accordance with § 24.2-646. The voter shall mark the mark sense ballot in the officer’s presence but in a secret manner and cover and return the ballot to the officer who shall immediately return to the polling place and deposit the ballot in the ballot counter in accordance with the instructions of the State Board.

Any county or city that has acquired an electronic voting device that is so constructed as to be easily portable may use the voting device in lieu of a paper or mark sense ballot for the voter requiring assistance pursuant to this subsection. However, the electronic voting device may be used in lieu of a paper ballot only so long as: (i) the voting device remains in the plain view of two officers of election representing two political parties or, in a primary election, two officers of election representing the party conducting the primary, provided that if the use of two officers for this purpose would result in too few officers remaining in the polling place to meet legal requirements, the

equipment shall remain in plain view of one officer who shall be either the chief officer or the assistant chief officer; and (ii) the voter casts his ballot in a secret manner unless the voter requests assistance pursuant to this section. After the voter has completed voting his ballot, the officer or officers shall immediately return the voting device to its assigned location inside the polling place. The machine number, the time that the machine was removed and the time that it was returned, the number on the machine's public counter before the machine was removed and the number on the same counter when it was returned, and the name or names of the officer or officers who accompanied the machine shall be recorded on the statement of results.²

Nowhere in this subsection has the General Assembly imposed a duty on an officer of election to remain outside the polling place to effectuate curbside voting. Generally, "[w]here the language of a statute is clear and unambiguous[,] rules of statutory construction are not required."³ Here, the plain language of the statute places the responsibility on the voter to request curbside voting if he or she wishes to use that form of assistance. Under the section, the requirement of the election officer to provide a ballot outside of the polling place arises only after such a request is made.⁴

Although election procedures are regulated principally by state law, Congress has enacted several laws imposing requirements on the conduct of federal elections. The Voting Accessibility for the Elderly and Handicapped Act (VAEH),⁵ for instance, requires each political subdivision overseeing federal elections to assure that all polling places for those elections are accessible to handicapped and elderly voters.⁶ For areas in which no polling place offers adequate accessibility, VAEH provides an exception, so long as the state's chief election officer

(B) assures that any handicapped or elderly voter assigned to an inaccessible polling place, *upon advance request of such voter* (pursuant to procedures established by the chief election officer of the State)—(i) will be assigned to an accessible polling place, or (ii) will be provided with an alternative means for casting a ballot on the day of the election.^[7]

VAEH expressly provides that a voter must first make a request before election officials have an obligation in federal elections either to assign the voter to an accessible polling place or to provide him an alternative means to cast a ballot on election day. Curbside voting is one such alternative. The language of this statute, like that of Virginia's § 24.2-649, indicates that the voter first is to make request, and leaves no room for an interpretation that an officer of election must be stationed and remain outside the polling place in order to implement the curbside voting alternative. This interpretation also comports with the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973,⁸ federal anti-discrimination statutes that have been invoked in election contexts.

Virginia offers curbside voting to any qualified voter who is age 65 or older or physically disabled to provide that voter with a less burdensome alternative to casting his or her vote

than what the voter might experience going into the polling place and waiting in line to vote. Virginia's requirement that the voter must take the initiative to request curbside voting furthers Virginia's important interest in ensuring a smooth, efficient election process. Election officers must fulfill many responsibilities over the course of a long election day. Given that oftentimes there are only a limited number of officers of election at any particular polling place, it may be infeasible to station an officer outside for the duration of the day without adversely impacting the election functions the remaining officers must perform.

CONCLUSION

Accordingly, it is my opinion that neither Virginia nor federal law requires that an officer of election be posted outside a polling place at all times that the polls are open on election day in order to assist elderly and disabled voters who prefer to vote by "curbside voting." It is further my opinion that the legal requirement for officers of election to assist such voters is triggered upon the voter making a request for such service, either by (i) entering the polling place to alert the officers of election, (ii) sending another person inside the polling place to alert the officers of election, or (iii) communicating with election officials in advance of coming to the polling place.

¹ Given that my response to your second question is in the affirmative, a response to your third question is not necessary.

² VA. CODE ANN. § 24.2-649(A) (Supp. 2010) (emphasis added).

³ See *Ambrogio v. Koontz*, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982); 2007 Op.Va. Att'y Gen. 24, 25.

⁴ Similarly, among the various provisions setting forth the duties and responsibilities of election officials, none mandates that officers of election remain outside in case a voter requires assistance. See VA. CODE ANN. Title 24.2, Chapter 6 (the part of the *Code* governing elections). Cf. §§ 24.2-604.1 (2006) (requiring polling places to have signs directing voters needing assistance to designated entrances); 24.2-604(H) (Supp. 2010) (permitting high school election pages to assist elderly and disabled voters; 24.2-606 (2006) (conferring power on officers on election to ensure order is preserved *inside and outside* of polling place).

⁵ See 42 U.S.C.A. §§ 1973ee, *et seq.*

⁶ See 42 U.S.C.A. § 1973ee-1. The Help America Vote Act of 2002 (42 U.S.C.A. §§ 15301 *et seq.*) mandates that voting machines and systems also be accessible for persons with disabilities, but does not address curbside voting procedures.

⁷ 42 U.S.C.A. § 1973ee-1(b)(2) (B) (emphasis added).

⁸ 42 U.S.C.A. §§ 12101, *et seq.*; 29 U.S.C.A. § 794, respectively. See *Taylor v. Onorato*, 428 F. Supp. 2d 384, 388 (W.D. Pa. 2006) (the ADA and Rehabilitation Act "mandate only that disabled persons are given the opportunity to vote"). See also U. S. Dep't of Justice Letter of Findings, No. 21 (September 10, 1993), available at <http://www.justice.gov/crt/foia/lofc021.txt> (finding South Carolina's curbside voting procedures for impaired voters unable to enter a polling place meet the program accessibility requirements of Title II of the ADA). Similar to Virginia's curbside voting procedures, South Carolina law provides for curbside voting "[w]hen the managers [of election] are informed that a handicapped or elderly voter cannot enter the polling place or cannot stand in line to vote." S.C. CODE ANN. § 7-13-771 (emphasis added).

CITY CHARTER, CITY OF PORTSMOUTH

Specific provisions of the Portsmouth City Charter would govern over the general provisions of the Code if election is to be held to fill a vacancy for the office of Mayor in the City.

THE HONORABLE L. LOUISE LUCAS

THE HONORABLE FREDERICK M. QUAYLE

MEMBERS, SENATE OF VIRGINIA

JUNE 25, 2010

ISSUE PRESENTED

You inquire, in the context of a recall election for the Mayor of the City of Portsmouth ordered pursuant to the recall procedures set forth in the Portsmouth City Charter, whether an election to fill a possible vacancy in the office of Mayor should be governed by that City's Charter, or whether it will be governed by a recently amended provision of the Code of Virginia if one or more candidates meet the requirements to be listed on the recall ballot for possible election to the office of Mayor.

RESPONSE

It is my opinion that, in the context of a recall election for which one or more candidates meet the requirements to be listed on the recall ballot for possible election to the City of Portsmouth office that is the subject of the recall, a possible vacancy in that office would be filled pursuant to the recall provisions of the City Charter of the City of Portsmouth.

BACKGROUND

You note that a petition has been filed to recall the Mayor of the City of Portsmouth. The Circuit Court for the City of Portsmouth has scheduled the recall election for July 13, 2010. You further relate that, during its 2010 session, the General Assembly modified the existing statute dealing with how vacancies in local elected offices should be filled.¹ That new law goes into effect on July 1, 2010.² The City Charter for the City of Portsmouth contains a provision addressing recall elections and how a vacancy should be filled should a recall election result in the removal of an officeholder.³

APPLICABLE LAW AND DISCUSSION

Section 24.2-226 does not specifically address recall elections. Rather, it provides a general procedure for filling vacancies in local government offices after those vacancies have occurred. Under its provisions, as amended by the General Assembly this year, within 15 days of the occurrence of the vacancy, the governing body must petition the circuit court to issue a writ of election to fill the vacancy.⁴ The circuit court then must issue a writ of election "promptly, which shall be no later than the next general election unless the vacancy occurs within 90 days of the next general election in which event it shall be held promptly but not later than the second general election."⁵ The City Charter for the City of Portsmouth, in contrast, provides a special procedure for filling an office *simultaneously* with a recall by specifying that the recall ballot present to the voters both the question whether the named officer shall be removed from office and below that question the names of the candidates to fill the office should the officer be removed.⁶ If a

majority of citizens approve the recall, then “the candidate receiving the highest number of the votes cast shall be declared elected.”⁷

The guiding principle governing the construction of charter provisions and general statutes is that conflicts between the two should be avoided if reasonably possible.⁸ The conflict between the two statutes must be clear and the provisions of the two so inconsistent with each other that both cannot prevail, before the prior statute will be held to be repealed or inoperative.⁹

Applying these principles, it is my opinion that there is no conflict between § 24.2-226, as amended, and the Portsmouth City Charter. Both can be reasonably construed to give full force and effect to each. The Code provision states a general rule that comes into play only when there is a vacancy in an elected local office. Under the City Charter, the recall procedures set forth a special rule for a recall election in which the voters simultaneously (i) determine whether to remove the office holder who is the subject of the recall and (ii) select the successor to that office holder from among candidates listed on the recall ballot. If the majority of votes cast in the recall election on the question of removal be affirmative, the office holder who is the subject of the recall is deemed removed upon the announcement of the official canvass of the election, and the candidate on the recall ballot receiving the highest number of votes is declared elected.¹⁰ The Charter also provides that, in the event the successor of the officer removed fails to qualify within 10 days after receiving notification of his election, “the office shall be deemed vacant.”¹¹ Thus, in the context of this recall election, the provisions of § 24.2-226 for filling a vacancy in a local office would come into play only if the recall election resulted in the removal of the officeholder and no prevailing candidate from the recall ballot qualified to assume the office within the 10-day window set forth in the Charter.

Moreover, it is settled law that

[a] later statute which is general does not repeal a former one that is particular unless negative words are used, or the acts are so entirely inconsistent that they cannot stand together. Thus laws existing for the benefit of particular municipalities ordinarily are not repealed by general laws relating to the same subject-matter. Stated in different phrase, where the subsequent general law and prior special laws, charter or ordinance provisions do not conflict, they both stand, but this result must depend, of course, upon the legislative intent which is to be ascertained from an examination and comparison of the whole course of legislation relating to the subject under consideration.^[12]

The changes made by the General Assembly in 2010 do not evince a clear intent by the legislature to displace more specific provisions contained in a city charter.

CONCLUSION

Accordingly, it is my opinion that, in the context of a recall election for which one or more candidates meet the requirements to be listed on the recall ballot for possible election to the City of Portsmouth office that is the subject of the recall, a possible

vacancy in that office would be filled pursuant to the recall provisions of the City Charter of the City of Portsmouth.

¹ 2010 Va. Acts ch. 431.

² VA. CONST. art. IV, § 13.

³ City of Portsmouth Charter § 10.09.

⁴ 2010 Va. Acts ch. 431.

⁵ *Id.*

⁶ City of Portsmouth Charter § 10.09(f).

⁷ City of Portsmouth Charter § 10.09(g).

⁸ See *Scott v. Lichford*, 164 Va. 419, 422-23, 180 S.E. 393, 394 (1935); 1991 Op. Va. Att’y Gen. 71, 74. See also *Kirkpatrick v. Board of Supervisors*, 146 Va. 113, 125, 136 S.E. 186, 190 (1926) (“where two statutes are in apparent conflict they should be so construed, if reasonably possible, so as to allow both to stand and to give force and effect to each”).

⁹ See *City of Richmond v. County Board*, 199 Va. 679, 685, 101 S.E.2d 641 (1958). See also 1986-87 Op. Va. Att’y Gen. 40, 41 (“presumption against an intent to modify or repeal a prior statute applies with particular force in the case of general legislation enacted subsequently to special, local legislation on the same subject”).

¹⁰ City of Portsmouth Charter § 10.09(g).

¹¹ *Id.*

¹² *Lichford*, 164 Va. at 423, 180 S.E. at 394.

OP. NO. 10-012

HEALTH: REGULATION OF MEDICAL CARE FACILITIES AND SERVICES – ABORTION CLINICS

PROFESSIONS AND OCCUPATIONS: Medicine and Other Healing Arts.

The Commonwealth may promulgate regulations for providers of first term abortions and the facilities in which such abortions are performed, provided the regulations adhere to constitutional limitations.

THE HONORABLE RALPH K. SMITH
MEMBER, SENATE OF VIRGINIA
THE HONORABLE BOB MARSHALL
MEMBER, HOUSE OF DELEGATES
AUGUST 20, 2010

ISSUE PRESENTED

You ask whether the Commonwealth can regulate facilities in which first trimester abortion services are provided and medical personnel who perform first trimester abortions.

RESPONSE

It is my opinion that the Commonwealth has the authority to promulgate regulations for facilities in which first trimester abortions are performed as well as for providers of first trimester abortions, so long as the regulations adhere to constitutional limitations.

APPLICABLE LAW AND DISCUSSION

To promote “the protection, improvement and preservation of the public health,”¹ the General Assembly has enacted Title 32.1 of the Code of Virginia, which provides in pertinent part for the regulation of medical and health care facilities.² In addition, because “the unregulated practice of the profession or occupation can harm or endanger the health, safety, or welfare of the public,”³ the Commonwealth further exercises its police power to oversee health professionals “for the exclusive purpose of protecting the public interest.”⁴

Virginia law provides that all hospitals in the Commonwealth are to be licensed⁵ and directs the State Health Commissioner to issue licenses in accordance with the regulations of the Board and other law. The Code broadly defines “hospital” as “any facility . . . in which the primary function is the provision of diagnosis, treatment, and of medical and nursing services, surgical or nonsurgical, for two or more nonrelated individuals, including . . . outpatient surgical [hospitals].”⁶ Although “abortion clinics” are not specifically mentioned, this definition encompasses facilities in which abortions are performed.⁷ Indeed, pursuant to its authority to classify hospitals,⁸ the Board of Health has deemed “outpatient abortion clinics” to be outpatient hospitals.⁹

For all hospitals, Virginia law requires minimum standards for their construction, maintenance, operation, staffing and equipping of hospitals.¹⁰ Institutions licensed as outpatient surgical hospitals, including those providing abortion services, are subject to the specific provisions of Part IV of the Board’s *Regulations for the Licensure of Hospitals in Virginia*.¹¹ Licensure requirements include disclosure of ownership,¹² inclusion of certain provisions in policy and procedure manuals,¹³ requisites for medical and nursing staffing,¹⁴ ensuring availability of sterile supplies,¹⁵ maintenance of accurate medical records,¹⁶ and provision of emergency plans and services,¹⁷ among others. In addition to these conditions, such facilities in which abortions are performed must also furnish records of abortion to the Division of Vital Records within ten days,¹⁸ ensure the diagnosis of pregnancy is made by the physician performing the abortion,¹⁹ and offer each patient counseling and instruction in the abortion procedure and birth control methods.²⁰

Medical facilities that provide abortion services in addition to many other services across a variety of disciplines clearly are subject to regulation by the Board. I note, however, that although the Board classifies “abortion clinics” as outpatient hospitals, neither the Regulations nor the Code define the term. Moreover, unlike later abortions, first-trimester abortions are not required to be performed in licensed hospitals.²¹ Health centers limiting their practice to specializing in reproductive services therefore often characterize themselves as “physicians’ offices,” whereby they are exempted from the Board’s licensure requirements.²² Nonetheless, the Board has broad authority to adopt

regulations as may be necessary to carry out the provisions of Title 32.1,²³ and this regulatory authority includes defining an “abortion clinic,” investigating the assertion by a facility that it constitutes physician’s office,²⁴ and regulating facilities beyond licensure.

Irrespective of the Board of Health’s ability to regulate facilities, the Board of Medicine (“BOM”) is vested with authority to regulate the practice of medicine,²⁵ which includes providing guidelines for certain procedures and the ability to license, investigate, and discipline physicians, including those who perform abortions.²⁶ The BOM’s *Regulations Governing the Practice of Medicine, Osteopathic Medicine, Podiatry and Chiropractic* sets forth, for example, requirements for the proper administration of general anesthesia in non-hospital settings,²⁷ a procedure that may be necessary depending on the abortion method employed. In addition, these regulations provide confidentiality, record keeping and advertising rules and prescribe educational and examination requirements for licensure.

Moreover, the BOM may deny, suspend or revoke a license based on “unprofessional conduct,”²⁸ which includes the “intentional or negligent conduct in the practice of any branch of the healing arts that causes or is likely to cause injury to a patient;”²⁹ conducting a practice in a manner dangerous to patients or the public;³⁰ and violating any statute or regulation relating to the distribution, dispensing, or administration of drugs.³¹ Notably, “[u]ndertaking in any manner or by any means whatsoever to procure or perform or aid or abet in procuring or performing a criminal abortion” also constitutes unprofessional conduct.³² These standards were enforced as recently as 2007, when the Court of Appeals of Virginia upheld the Board of Medicine’s suspension of the medical license of a physician who failed to use the proper standard of care in diagnosing the gestational age of a fetus for the purpose of performing an abortion.³³

In addition to applying regulations governing medical facilities and health care providers in general, the relevant agencies are authorized to impose regulations particular to abortion services. The General Assembly has afforded certain agencies broad authority to regulate in the area of health and has permitted them to classify facilities, procedures and personnel as they deem necessary and to promulgate regulations accordingly. Regulations would be appropriate when medical procedures carry certain risks. The potential complications of abortion procedures include hemorrhage, cervical laceration, uterine perforation, injury to the bowels or bladder and pulmonary complications.³⁴ Furthermore, these complications “must be immediately and adequately treated.”³⁵ Regulatory boards may distinguish between abortion and other procedures because, ““abortion is inherently different from other medical procedures,””³⁶ and “for the purpose of regulation, abortion services are rationally distinct from other routine medical services if for no other reason than the particular gravitas of the moral, psychological, and familial aspects of the abortion decision.”³⁷

Based on Virginia’s police power to protect its citizens’ health and welfare, the broad authority granted to the regulatory boards, and the extensive statutory and regulatory scheme currently applicable to physicians performing abortions and the facilities in which such services are available, I conclude that the Commonwealth, by the Virginia Board of Health, the Virginia Board of Medicine, or any other proper agency, has the

authority to continue to promulgate regulations affecting the performance of first trimester abortions.

Virginia previously exercised this authority, when on November 12, 1981, the Virginia Board of Health (“Board”) adopted “Rules and Regulations for the Licensure of Outpatient Hospitals, Part V, Outpatient Hospitals Performing Abortions Only.”³⁸ Those regulations subsequently were withdrawn in 1984, but not based upon a lack of authority. Instead, the repeal was based upon the view that such regulations collided with precedent from the United States Supreme Court.³⁹ More recent precedent from the United States Court of Appeals for the Fourth Circuit provides clear guidance with respect to what constitutes permissible regulation and what does not.

The State’s authority to regulate abortion is limited by the United States Supreme Court’s evolving jurisprudence. Beginning in 1973 with *Roe v. Wade*, the Court announced a right for a woman to end a pregnancy through an abortion.⁴⁰ While acknowledging that the Constitution does not contain an express guarantee of privacy, the Court reasoned that the Constitution does recognize “a right of personal privacy, or a guarantee of certain areas or zones of privacy.”⁴¹ This right, the Court explained, derives from specific constitutional amendments, “the concept of liberty guaranteed by the first section of the Fourteenth Amendment,” and the “penumbras of the Bill of Rights.”⁴² Ultimately, the Court concluded in *Roe v. Wade* that “[t]his right of privacy” – whatever its origin – “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”⁴³ Over time, the Court has reaffirmed the “essential holding” of *Roe* – that a woman has a constitutional right to “have an abortion before viability and to obtain it without undue interference from the State.”⁴⁴ This right, however, is framed by the State’s “legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus.”⁴⁵

The Supreme Court has sustained a state statute requiring all abortions, including first trimester abortions, to be performed by physicians only.⁴⁶ The Court reasoned that such a regulation did not impose a substantial obstacle to obtaining an abortion.⁴⁷ The Court further noted that “the constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals.”⁴⁸

In this circuit, the parameters within which states may constitutionally regulate first trimester abortion services were articulated by the United States Court of Appeals for the Fourth Circuit in *Greenville Women’s Clinic v. Bryant*.⁴⁹ The Court upheld South Carolina legislation and regulations that, in essence, extended the rules already imposed on facilities offering second trimester abortions to establishments in which five or more first trimester abortions were performed. The regulations at issue concerned licensing requirements; staffing rules; specified drug, equipment and laboratory availability; detailed record keeping and reporting duties; maintenance, safety and emergency policies; sterilization procedures; and design and construction standards.⁵⁰ Recognizing that the state has a valid interest ““from the outset of the pregnancy in protecting the health of the woman and the life of the fetus,””⁵¹ the Court found that “there is no requirement that a state refrain from regulating abortion facilities until a public-health problem manifests itself.”⁵²

“To the extent that state regulations interfere with the woman’s status as the ultimate decisionmaker, or try to give the decision to someone other than the woman, the Court has invalidated them.”⁵³ State regulations that serve “a valid purpose” and do not “strike at the [abortion] right itself” are valid regulations.⁵⁴ In rendering its decision, the Court considered the costs associated with compliance,⁵⁵ and despite finding that the regulations likely would increase costs to women seeking abortion, the Court determined that because the impact was not prohibitive, the increased financial imposition did not constitute an undue burden on a woman’s ability to decide whether to terminate her pregnancy.⁵⁶ It is “[o]nly when the increased cost of abortion is prohibitive, essentially depriving women of the choice to have an abortion, has the Court invalidated regulations because they impose financial burdens.”⁵⁷

Ultimately, the Fourth Circuit concluded that the South Carolina regulations, addressing medical and safety aspects of providing abortions, as well as the recordkeeping and administrative practices of abortion clinics, and which applied to all abortions including abortions performed during the first trimester, were valid. These regulations permitted the abortion practice to continue without significant interference while assuring a “dignified and safe procedure.”⁵⁸ In sum, I conclude that the Commonwealth has similar authority to regulate facilities in which first trimester abortions are provided and those persons performing them, so long as the regulations adhere to these constitutional considerations.

CONCLUSION

Accordingly, it is my opinion that the Commonwealth has the authority to promulgate regulations for facilities in which first trimester abortions are performed as well as providers of first trimester abortions, so long as the regulations adhere to constitutional limitations.

¹ VA. CODE ANN. § 32.1-2 (2009).

² See *Code of Virginia*, Title 32.1, Chapter 5 “Regulation of Medical Care Facilities and Services,” §§ 32.1-123 through 32.1-162.15 (2009 & Supp. 2010).

³ VA. CODE ANN. § 54.1-100 (2009).

⁴ *Id.*

⁵ Section 32.1-125 (2009).

⁶ Section 32.1-123 (2009).

⁷ The description of the primary function of a hospital encompasses the abortion process. See 2007 Op. Va. Att’y Gen. 53.

⁸ Section 32.1-127(B)(3) (2009).

⁹ 12 VA. ADMIN. CODE § 5-410-10 (2010).

¹⁰ Sections 32.1-127(B); 32.1-127.001 (2009).

¹¹ 12 VA. ADMIN. CODE § 5-410-1150 to 1380, “Part IV, Outpatient Surgical Hospitals: Organization. Operation, and Design Standards for Existing and New Facilities” (2010).

¹² *Id.* § 1150

¹³ *Id.* § 1170

¹⁴ *Id.* §§ 1180, 1190.

¹⁵ *Id.* § 1210.

¹⁶ *Id.* § 1260.

¹⁷ *Id.* §§ 1230; 1240.

¹⁸ *Id.* § 1260(C)(3)

¹⁹ *Id.* § 1270(D).

²⁰ *Id.* § 1270(E)

²¹ Compare VA. CODE ANN. § 18.2-72 with §§ 18.2-73; 18.2-74 (2009).

²² Section 32.1-124 provides that the provisions relating to hospital licensure and inspection do not apply to “an office of one or more physicians or surgeons unless such office is used principally for performing surgery.” “Surgery” is defined neither by the Code nor by the Regulations.

²³ Section 32.1-12.

²⁴ See §§ 32.1-12; 32.1-127 (2009). The Department of Health does not currently investigate a facility’s status as a physician’s office or whether the office principally performs surgery, but the Commissioner of Health or his designee may enter onto any property to inspect or investigate to determine compliance with any law or regulation. Section 32.1-25 (2009). Upon discovering that a facility meets the definition of a hospital rather than a physician’s office, the Commissioner can petition an appropriate circuit court for an injunction to either compel licensure or the cessation of operations. Section 32.1-27 (2009).

²⁵ Section 54.1-2900 (2009) defines “practice of medicine” as “the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities by any means or method.” Clearly, performing an abortion procedure constitutes engaging in the practice of medicine.

²⁶ See §§ 54.1-2400; 54.1-2503; 54.1-2929 (2009). Virginia law requires that abortions be performed by a “physician licensed by the Board of Medicine to practice medicine and surgery[.]” Section 18.2-72 through 74. Even if the abortion procedure used is delegable under § 54.1-2901(A) or § 54.1-2952 to nurses or physicians assistants, those personnel are subject to their own regulations and licensing requirements (See §§ 54.1-3000 through 54.1-3043; 18 VA. ADMIN. CODE § 90-11 to 90-40; §§ 54.1-2949 through 54.1-2953; 18 VA. ADMIN. CODE § 50-10-184) and must be supervised by a licensed physician (See 18 VA. ADMIN. CODE § 85-20-29; VA. CODE ANN. §§ 54.1-2901; 54.1-2952). Moreover, persons prescribing or dispensing pharmaceuticals are subject to regulation. See §§ 32.1-126.02; 54.1-2519 through 54.1-2526; 54.1-2952.1; 54.1-2957.01; 54.1-3300 through 54.1-3322; 54.1-3400 through 54.1-3472; 18 VA. ADMIN. CODE §§ 110-20-11 through 110-20-730; 110-30-10 through 110-30-270 (2010).

²⁷ See 18 VA. ADMIN. CODE §§ 20-310 to 390; VA. CODE ANN. §§ 54.1-2901; 54.1-2912.1 (2009).

²⁸ Section 54.1-2915(A) (2009).

²⁹ Section 54.1-2915(A)(3).

³⁰ Section 54.1-2915(A)(13).

³¹ Section 54.1-2915(A)(17).

³² Section 54.1-2915(A)(6).

³³ *Abofreka v. Virginia Board of Medicine*, No. 2793-06-4, 2007 Va. App. LEXIS 304 (Va. Ct. App. Aug. 14, 2007).

³⁴ ERIC R. STRASBURG, *Abortion*, in MANUAL OF CLINICAL PROBLEMS IN OBSTETRICS AND GYNECOLOGY 6 (Michael E. Rivlin, Rick W. Martin eds. 4th ed. 1994). See also PHILLIP G. STUBBLEFIELD, *Complications of Induced Abortion*, in EMERGENCY CARE OF THE WOMAN 37-47 (Mark D. Pearlman, Judith E. Tintinalli eds., 1998) (detailing possible complications of abortion procedures).

³⁵ STRASBURG, *Abortion*, at 6.

³⁶ *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 174 (4th Cir. 2000), cert. denied 531 U.S. 1191 (2001), (citing *Harris v. McCrae*, 448 U.S. 297, 325 (1980)).

³⁷ *Id.* at 173.

³⁸ The regulations became effective on May 1, 1982. The regulations included, among other requirements, disclosure of ownership, limits on abortions performed in the clinics to those occurring in the first trimester, presence of a Medical Director and appropriate nursing and counseling staff, and detailed clinical area design. Rules and Regulations for the Licensure of Outpatient Hospitals, Part V, Outpatient Hospitals Performing Abortions Only, Organization, Operation and Design Standards for Existing and New Facilities §§ 900.2, 902.1.2, 903.1.1, 903.2, 903.3, 905.5.2.

³⁹ Regulatory Review Summary, Repeal of Part V, 17 September 1984. This view was repeated in a letter by Governor Charles S. Robb. “[T]he Board and the Department,” the Governor wrote, “cannot enforce laws and regulations that have been determined to be invalid by United States Supreme Court decisions. We have checked this point with the Attorney General’s office and have been told that indeed such laws and regulations cannot be enforced by the Department.” Charles S. Robb, Governor to The Most Reverend Walter F. Sullivan, 15 October 1984.

⁴⁰ See, e.g., *Roe v. Wade*, 410 U.S. 113, 153-56 (1973). See also *Thornburgh v. Am. Coll. Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Gonzales v. Carhart*, 550 U.S. 124 (2007).

⁴¹ *Roe*, 410 U.S. at 152.

⁴² *Id.*

⁴³ *Id.* at 153.

⁴⁴ *Greenville Women’s Clinic*, 222 F.3d at 166 (quoting *Casey*, 505 U.S. at 846 (plurality opinion)).

⁴⁵ *Id.*

⁴⁶ *Mazurek v. Armstrong*, 520 U.S. 968, 974-75 (1997) (*per curiam*) (overturning preliminary injunction).

⁴⁷ *Id.* at 972.

⁴⁸ *Id.* at 973 (quoting *Casey*, 505 U.S. at 885).

⁴⁹ *Greenville Women’s Clinic*, 222 F.3d at 174.

⁵⁰ *Id.* at 160-162.

⁵¹ *Id.* at 165, 166 (citing *Casey*, 505 U.S. at 846).

⁵² *Id.* at 169.

⁵³ *Id.* at 166.

⁵⁴ *Id.* (citing *Casey*, 505 U.S. at 878). The Fourth Circuit noted that if a regulation serves a valid purpose, such as furthering the health or safety of a woman seeking an abortion, and not designed to strike at the right itself, the fact that it also has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.

⁵⁵ *Id.* at 170-72.

⁵⁶ *Id.* (citing *Casey*, 505 U.S. at 874, 875, 878).

⁵⁷ *Id.* (citing *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 434-39 (1983)).

⁵⁸ *Id.* at 175.

OP. NO. 10-071

HOUSING: UNIFORM STATEWIDE BUILDING CODE

Infrequent use of a farm building or structure to host occasional social events does not constitute a change in occupancy requiring the obtaining of an occupancy permit.

KEVIN J. BURKE, ESQUIRE
FAUQUIER COUNTY ATTORNEY
AUGUST 23, 2010

ISSUE PRESENTED

You ask whether the use of a “farm building or structure” for the purposes of hosting events like concerts, dances and wedding receptions constitutes a change in the occupancy classification of the structure sufficient to require the structure’s compliance with the Uniform Statewide Building Code (“building code”) and to require the owner of such a structure to obtain an occupancy permit for such events.

RESPONSE

It is my opinion that the infrequent use of a “farm building or structure” to host a concert, dance or other social gathering does not constitute a change in occupancy classification and, therefore, does not require the owner to obtain an occupancy permit for the new uses.

BACKGROUND

You note that owners of farm buildings or structures, which are exempt from the building code, periodically use those buildings for non-agricultural uses. You relate that examples of the new, non-agricultural uses include the hosting of concerts, wedding receptions and dances. You request advice on the issue of whether the owner of a structure defined as a “farm building or structure” who wishes to occasionally use his property for non-agricultural uses must obtain an occupancy permit for the new use.

APPLICABLE LAW AND DISCUSSION

The building code generally requires the owner of a building to obtain an occupancy permit when a building undergoes a “change of occupancy.”¹ Farm buildings and structures are exempt from the requirements and standards embodied in the building code.² For the purposes of the building code, “farm building or structure” is defined as a:

[B]uilding or structure not used for residential purposes, located on property where farming operations take place, and used *primarily* for any of the following uses or combination thereof:

1. Storage, handling, production, display, sampling or sale of agricultural, horticultural, floricultural or silvicultural products produced in the farm;
2. Sheltering, raising, handling, processing or sale of agricultural animals or agricultural animal products;
3. Business or office uses relating to the farm operations;
4. Use of farm machinery or equipment or maintenance or storage of vehicles, machinery or equipment on the farm;
5. Storage or use of supplies and materials used on the farm; or

6. Implementation of best management practices associated with farm operations.^[3]

So long as a building (1) is not used for residential purposes, (2) is located on property where farming operations take place and (3) is used *primarily* in one of the uses provided, the requirements of the building code do not apply.⁴

The General Assembly's reliance on the term "primarily" indicates that the General Assembly contemplated that some non-specified uses would be made of these buildings. The answer to your question thus ultimately turns on the circumstances of each individual case. Permanent changes in the use of a structure – for example, the remodeling of a barn into a residence – would call for a new occupancy permit for the structure.⁵ An occasional use, such as using a barn several times per year for a wedding reception, would not alter the fact that the barn remains "primarily" devoted to a specified farm use and, therefore, would not destroy the exempt status of the barn as a "farm building or structure."⁶

CONCLUSION

Accordingly, it is my opinion that the occasional use of a "farm building or structure" to host a concert, dance or other social gathering does not constitute a change in occupancy classification and, therefore, does not require the owner to obtain an occupancy permit for the new use.

¹ 13 VA. ADMIN. CODE 5-63-30(C) (2010).

² VA. CODE ANN. § 36-99(B) (2010). This is true for all farm buildings and structures except for those that are used as a restaurant as defined in VA. CODE ANN. § 35.1-1 (2010) and any farm building located "within a flood plain or in a mudslide-prone area." *Id.* Farm buildings located within flood plains are "subject to flood-proofing regulations or mudslide regulations, as applicable." *Id.*

³ Section 36-97 (2010) (emphasis added).

⁴ *Id.*

⁵ When a farm building or structure falls outside the scope of the exemption, either because it is no longer primarily used for one of the specified purposes, because it is used for residential purposes, or is no longer located on property where farming operations take place, the strictures of 13 VA. ADMIN. CODE 5-63-30(C) (2010) would require the owner to obtain a new occupancy permit.

⁶ This conclusion draws further strength from the fact that the General Assembly in 2000 was made aware of the fact that farm buildings are employed for purposes other than farm use and that these alternative purposes presented safety concerns. See Report of the Board of Housing and Community Development, Virginia Farm Buildings and Structures and the Uniform Statewide Building Code, House Doc. No. 28 (2000). Legislative inaction in the wake of this report supports the understanding that these farm buildings remain exempt from the requirements of the building code so long as they are used primarily for the specified purposes.

OP. NO. 10-076

HOUSING: UNIFORM STATEWIDE BUILDING CODE

County is not required to enforce the Property Maintenance Code in a town of less than 3,500 if the town has not appointed nor contracted with an official to enforce the Uniform Statewide Building Code.

C. ERIC YOUNG, ESQUIRE
TAZEWELL COUNTY ATTORNEY
DECEMBER 10, 2010

ISSUE PRESENTED

You inquire whether a County is required to enforce the Property Maintenance Code portion of the Uniform Statewide Building Code in a town with a population of less than 3,500 within that County, where the town has adopted the Property Maintenance Code but has not appointed, nor contracted with, an official to enforce the Uniform Statewide Building Code.

RESPONSE

It is my opinion that a County is not required to enforce the Property Maintenance Code portion of the Uniform Statewide Building Code in a town with a population of less than 3,500 within that County, where the town has adopted the Property Maintenance Code but has not appointed, nor contracted with, an official to enforce the Uniform Statewide Building Code.

APPLICABLE LAW AND DISCUSSION

As you note, the Virginia Uniform Statewide Building Code (“USBC”) is adopted in several parts: Part I covering new construction, Part II covering rehabilitation, and Part III covering maintenance of existing structures.¹ Enforcement by a locality of the provisions of the USBC for construction and rehabilitation is mandatory.²

With respect to Parts I and II of the USBC, when a town with a population of less than 3,500 has not elected to administer or enforce them, the county in which the town is situated must administer and enforce those parts of the USBC for that town.³ A county is required to administer and enforce the USBC in a town only if the town “does not elect to administer and enforce” the USBC.⁴ If a town does elect to enforce Parts I and II, then the obligation otherwise imposed on the surrounding county by § 36-105(A) does not apply.

While the administration and enforcement of Parts I and II of the USCB are mandatory, § 36-105(C) grants localities the discretion to elect to administer and enforce Part III, which relates to the maintenance of existing structures. When a town chooses to enforce Part III, the “inspection and enforcement shall be carried out by an agency or department designated by the local governing body.”⁵

Where a town has chosen to enforce the maintenance provisions of the Building Code, but has not designated an agency or department of the Town to fulfill this role, the county surrounding the town is not responsible for administering the maintenance component of the USBC. The text of the statute limits the county's responsibility for the enforcement of the USBC in a town to the "section" of the statute dealing with Parts I and II, the mandatory construction and rehabilitation components, of the USBC.⁶ The term "section" "is generally defined as the smallest distinct subdivision of a legislative act."⁷ Unlike subpart (A), subpart (C) of § 36-105, which is a separate "section" of the statute, does not contain a requirement that the county administer Part III of the USBC in the situation where a town elects to enforce its maintenance provisions, but has failed to designate an agency or department to fulfill this responsibility.⁸ Indeed, a county could not, absent an agreement⁹ or a statutory mandate, administer the maintenance of existing structures component of the USBC within the boundary of a town.¹⁰

CONCLUSION

Accordingly, it is my opinion that a County is not required to enforce the Property Maintenance Code portion of the Uniform Statewide Building Code in a town with a population of less than 3,500 where the town has adopted the Property Maintenance Code but has not appointed, nor contracted with, an official to enforce the Uniform Statewide Building Code.

¹ See 13 VA. ADMIN. CODE §§ 5-63-10 (new construction), 5-63-400 (rehabilitation), and 5-63-450 (maintenance).

² See VA. CODE ANN. § 36-105(A) (Supp. 2010) ("Enforcement of the provisions of the Building Code for construction and rehabilitation shall be the responsibility of the local building department."). See also 2005 Op. Va. Att'y Gen. 121, 122-23.

³ See 2005 Op. Va. Att'y Gen. 121, 122-23 (discussing § 36-105(A)).

⁴ Section 36-105(A).

⁵ Section 36-105(C).

⁶ Section 36-105(A).

⁷ *Gilmore v. Landside*, 252 Va. 388, 398, 478 S.E.2d 307, 313 (1996).

⁸ Section 36-105(C).

⁹ VA. CODE ANN. § 15.2-1300(B) (2008) ("Any two or more political subdivisions may enter into agreements with one another for joint action.").

¹⁰ *Cf.* § 15.2-1201 (2008) (Providing that a county board of supervisors has the same power and authority as a city council and, further, that "[n]o powers or authority conferred upon the boards of supervisors of counties solely by this section shall be exercised within the corporate limits of any incorporated town except by agreement with the town council.").

OP. NO. 10-047

IMMIGRATION: ENFORCEMENT

Virginia law enforcement officers, including conservation officers may inquire into the immigration status of persons stopped or arrested. Zoning officers do not have the authority to investigate criminal violations of the law, including violations of federal immigration law.

THE HONORABLE ROBERT G. MARSHALL
MEMBER, VIRGINIA HOUSE OF DELEGATES
JULY 30, 2010

ISSUES PRESENTED

You inquire whether Virginia law enforcement officers, under present state law, may conduct investigations into the immigration status of persons stopped or arrested by law enforcement and, specifically, whether Virginia officials presently have the same authority as Arizona officers under a recently enacted Arizona statute, and, further, whether that authority extends to Virginia state park personnel and local zoning officials.

RESPONSE

It is my opinion that Virginia law enforcement officers, including conservation officers, may, like Arizona police officers, inquire into the immigration status of persons stopped or arrested; however, persons tasked with enforcing zoning laws lack the authority to investigate criminal violations of the law, including criminal violations of the immigration laws of the United States.

BACKGROUND

You note that Arizona recently enacted the “Support Our Law Enforcement and Safe Neighborhoods Act” (“Act”).¹ The Act contains a number of provisions and prohibitions concerning illegal aliens. Most germane to your inquiry, the Act directs police officers to make a “reasonable attempt, when practicable, to determine the immigration status of a person” who is arrested or in custody “except if the determination may hinder or obstruct an investigation.”² This provision applies only if the person is already lawfully stopped, detained or arrested in connection with the enforcement of some law *other* than immigration law.³ Furthermore, law enforcement officers specifically are directed not to “consider race, color or national origin . . . except to the extent permitted by the United States or Arizona Constitution.”⁴ Under the Act, the immigration status of an alien is determined by (1) “a law enforcement officer who is authorized by the federal government to verify or ascertain an alien’s immigration status;” or (2) an agent of Immigration and Customs Enforcement (“ICE”).⁵

APPLICABLE LAW AND DISCUSSION

A prior opinion of this Office addresses whether state and local officers in Virginia have the authority to detain and arrest individuals who have violated a criminal law of the United States, including a criminal violation of the immigration laws of the United States.⁶ The opinion concluded that law enforcement officers in Virginia in fact have the authority to arrest persons for criminal violations of immigration laws.⁷ Indeed, it would

be most surprising if state and local officers lacked the authority, where appropriate, to arrest individuals suspected of committing federal crimes such as bank robbery, kidnapping or terrorism. State and local officers are not required to stand idly by and allow such criminals to proceed with impunity. The same holds true with criminal violations of the immigration laws.

Due to the uncertainty in the law, however, the 2007 opinion counseled against arrests for civil violations of federal immigration laws.⁸ That uncertainty is present on two levels. As a matter of state law, the authority of police officers to arrest for civil violations is restricted by statute.⁹ Sheriffs are not so limited, but neither does the Code expressly authorize sheriffs to make arrests for civil violations of federal immigration laws.¹⁰ The 2007 opinion further noted that federal law is unclear regarding the authority of state law enforcement to arrest for civil violations of immigration laws.¹¹ The opinion concluded that, absent an agreement between the federal government and a state or local law enforcement agency authorizing arrests for *civil*, as opposed to criminal, violations of immigration laws, known as a § 287(g) agreement,¹² state officers should refrain from making arrests for civil violations until the law is clarified.¹³ There has been no clarification or change in the law since that opinion was issued that would suggest a different conclusion at the present time.

The previous opinion, which dealt with the authority of state and local officers to *arrest* for federal immigration violations, does not answer your more specific question: whether Virginia officers have the legal authority to *inquire* about the legal status of persons who are stopped or arrested in a manner similar to that contemplated by the Arizona Act. The new Arizona law does not purport to grant new powers to law enforcement officers in Arizona; nor does it suggest the absence of authority by police officers in Virginia. The Arizona law expressly leaves the determination of an alien's immigration status to ICE or to a federally authorized law enforcement officer. Virginia law enforcement officers have the authority to make the same inquiries as those contemplated by the new Arizona law. So long as the officers have the requisite level of suspicion to believe that a violation of the law has occurred, the officers may detain and briefly question a person they suspect has committed a federal crime.¹⁴ Furthermore, the United States Supreme Court has found that so long as the questioning does not prolong a lawful detention, police may ask questions about immigration status.¹⁵

It also should be noted that under Article 36 of the Vienna Convention on Consular Relations, state and local officers are *required* to advise foreign nationals of their right to speak with a consular officer when those persons are arrested and held for longer than a short period of time.¹⁶ It is difficult – if not impossible – to effectively provide that advice, mandated by treaty, without making an inquiry into the nationality of a person who is in custody.

You also ask about the authority of state park personnel to conduct inquiries about immigration status. The authority conferred on the Director of the Department of Conservation and Recreation does not include the general authority granted to police officers to prevent and detect crime, apprehend criminals, safeguard life and property, preserve peace, or to enforce state and local laws, regulations and ordinances.¹⁷ On the

other hand, conservation officers, appointed by the Director of the Department of Conservation and Recreation, are “law enforcement officers” and are given the authority “to enforce the laws of the Commonwealth and the regulations of the Department.”¹⁸ These officers can, like local law enforcement officers and officers of the State Police, arrest for “any crime” committed in their presence or for felonies not committed in their presence.¹⁹ Nothing in Virginia or United States law prohibits conservation officers from inquiring about criminal violations of the immigration laws and, where appropriate, making an arrest.

Local zoning officials, however, are not vested with the same general authority to investigate and enforce violations of the criminal laws.²⁰ Zoning ordinances are designed to promote the health, safety, convenience or general welfare of the public and to plan for the future development of communities.²¹ Zoning ordinances, moreover, are civil in nature and carry civil penalties.²² Persons who refuse to abate a violation are subject to only misdemeanor punishment.²³ In addition, certain cities may rely on volunteers to enforce zoning requirements, further demonstrating the generally civil nature of zoning enforcement.²⁴ Therefore, local zoning officials lack the authority to investigate criminal violations of federal immigration statutes and do not possess the authority to arrest for such violations. Of course, persons tasked with zoning enforcement can, like any responsible citizen, report to the proper authorities any suspected violations of the law, including immigration violations, that they encounter while performing their duties.

CONCLUSION

Accordingly, it is my opinion that Virginia law enforcement officers, including conservation officers, may, like Arizona police officers, inquire into the immigration status of persons stopped or arrested; however, persons tasked with enforcing zoning laws lack the authority to investigate criminal violations of the law, including criminal violations of the immigration laws of the United States.

¹ Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Sess. Laws 211.

² *Id.* at § 11-1051(B).

³ *Id.*

⁴ *Id.* at § 11-1051(B).

⁵ *Id.* at § 11-1051(B).

⁶ See 2007 Op. Va. Att’y Gen. 108, 109.

⁷ *Id.* at 109-114.

⁸ See 8 U.S.C.S. 1326 (LexisNexis 2010).

⁹ See VA. CODE ANN. § 15.2-1704 (2008).

¹⁰ See VA. CODE ANN. §§ 15.2-530; 15.2-1609 (2008) (providing general authority of sheriff). Certain Code sections expressly call upon sheriffs to perform civil duties. See, e.g. VA. CODE ANN. § 55-237.1 (sheriffs to oversee removal of personal property from premises pursuant to an eviction).

¹¹ See 2007 Op. Va. Att’y Gen. 108, 110-12 (noting conflicting pronouncements on the issue from federal courts and from the United States Department of Justice).

¹² See 8 U.S.C.S. 1357(g)(1) (LexisNexis 2010).

¹³ *Id.* at 114.

¹⁴ See, e.g., *Adams v. Williams*, 407 U.S. 143, 145-46 (1972). *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005).

¹⁵ *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005).

¹⁶ *Vienna Convention on Consular Relations*, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. A brief investigative detention would not trigger the right.

¹⁷ Compare VA. CODE ANN. § 10.1-301 (2006) (establishing duties of the Director of the Department of Conservation and Recreation) with § 15.2-1704 (broadly providing that local police officers are responsible “for the prevention and detection of crime”).

¹⁸ Section 10.1-117 (2006).

¹⁹ VA. CODE ANN. § 19.2-81(A)(8) and (B) (2008).

²⁰ See § 15.2-2299 (2008) (specifying enforcement authority of zoning officers).

²¹ See §§ 15.2-2200, 15.2-2283 (2008).

²² See § 15.2-2209 (2008).

²³ Section 15.2-2286(A)(5) (Supp. 2008).

²⁴ See § 15.2-1132 (2008).

OP. NO. 10-027

INSURANCE: HOME SERVICE CONTRACT PROVIDERS – ENFORCEMENT

State Corporation Commission lacks the authority to bring an enforcement action against home service contract providers when statutory exception applies. Home service contract providers may qualify as “contractors” if engaged in certain work and then must also be licensed as contractors.

THE HONORABLE CHRISTOPHER K. PEACE

MEMBER, HOUSE OF DELEGATES

MAY 20, 2010

ISSUES PRESENTED

You inquire about several aspects of Virginia law governing home service contract providers. Specifically, you ask whether a consumer who contracts with a home service contract provider has any recourse with the State Corporation Commission related to such contract in light of the exemptions found in current § 38.2-2618, and as amended in 2010.¹ You further ask whether such providers are contractors required to be licensed pursuant to Chapter 11 of Title 54.1, §§ 54.1-1100 through 54.1-1143 (“Chapter 11”). Finally, you ask whether home service contract providers must comply with Chapter 11 when hiring contractors and subcontractors to perform work under the home service contracts they administer.

RESPONSE

It is my opinion that when one of the exemptions to § 38.2-2618 applies to a home service contract provider, including the exemption added in 2010,² the State Corporation Commission would not have the authority to bring an enforcement action under § 38.2-2627. It further is my opinion that the terms of the home service contract dictate

whether a home service contract provider is considered to be a contractor. Should a provider be considered to be a contractor, he must be licensed as a contractor pursuant to Chapter 11 of Title 54.1. Finally, it is my opinion that when home service contract providers are considered to be contractors, they must comply with Chapter 11 when they manage and superintend contractors and subcontractors to perform work under the home service contracts they administer. They are not required to comply with Chapter 11 merely by hiring a contractor or subcontractor.

APPLICABLE LAW AND DISCUSSION

You first inquire whether a consumer who contracts with a home service contract provider (“HSC provider”) has any recourse with the State Corporation Commission (“Commission”) regarding such contract. Article 2, Chapter 26 of Title 38.2, §§ 38.2-2617 through 38.2-2628 (“Article 2”), regulates home service contracts and HSC providers. The Commission may enforce the law through an administrative action.³ The current version of § 38.2-2618 contains specific exemptions from Article 2. The 2010 Session of the General Assembly amended this provision to add an exemption for “[a]ny home service contract provider that has a net worth in excess of \$100 million.”⁴ Under the plain language of this amendment, an HSC provider with a net worth in excess of \$100 million would be exempt from the statute. Furthermore, warranties and maintenance agreements are likewise specifically excluded from the scope of Article 2.⁵ Therefore, the Commission would not be authorized to bring an enforcement action pursuant to § 38.2-2627.

You next ask whether HSC providers may, depending on the terms of such contracts, be considered contractors. If so, you ask whether such providers would be required to be licensed as contractors pursuant to Chapter 11. Section § 38.2-2617 currently defines a “home service contract,” in pertinent part, as

a contract or agreement for a separately stated consideration for a specific duration to perform the repair, replacement, or maintenance of property or indemnification for repair, replacement, or maintenance, for the operational failure of any components, parts, appliances, or systems of any covered residential dwelling due to a defect in materials, workmanship, inherent defect, or normal wear and tear, with or without additional provisions for incidental payment of indemnity under limited circumstances. Home service contracts may provide for the repair, replacement, or maintenance of property for damage resulting from power surges or interruption and accidental damage from handling and may provide roof leak coverage.^[6]

Section 54.1 – 1100 of Article 11 defines a “contractor” as

any person, that for a fixed price, commission, fee, or percentage undertakes to bid upon, or accepts, or offers to accept, orders or contracts for performing, managing, or superintending in whole or in part, the construction, removal, repair or improvement of any building or structure permanently annexed to real property owned, controlled, or

leased by him or another person or any other improvements to such real property.

Further, I note that

[t]he classification “any person” is comprehensive, broad, unlimited, unrestricted, and indiscriminative of whatever kind. It includes a person, whether he be an architect, an engineer, an agent, a servant, a superintendent, a supervisor, or a contractor, independent or dependent, who undertakes to do the things specified by the statute. It makes no difference what a person calls himself. If he does what is specified by the statute, then the statute fixes his classification.^[7]

Contractors are required to obtain a license.⁸ The act of “[c]ontracting for, or bidding upon the construction, removal, repair or improvements to or upon real property owned, controlled or leased by another person without a license” is prohibited, and a violation thereof would constitute a Class 1 misdemeanor.⁹

It is my opinion that HSC providers would meet the definition of a contractor under home service contracts that are agreements to perform repairs, replacement, or maintenance of property for consideration. Such HSC providers, however, would not meet the definition of a contractor when the agreements at issue are agreements to indemnify for such repairs, replacement, or maintenance of property. Consequently, whether an HSC provider also is a contractor would depend on the exact terms of the individual home service contracts, and each contract must be examined on a case-by-case basis.

Section 54.1-1101 of Chapter 11 contains exemptions to the licensure requirement for contractors, but it does not appear that an HSC provider would qualify for any of these exemptions. Should an HSC provider be considered a contractor based on the terms of a home service contract, such provider would be required to be licensed as a contractor.

Finally, when the terms of a home service contract are such that the HSC provider is considered to be a contractor, you ask whether that provider would be compelled to comply with the requirements of Chapter 11 when hiring contractors and subcontractors to perform work under such contract. The definition of “contractor” is not limited to persons who directly perform construction. It also includes those who “manag[e]” and “superintend[]”,¹⁰ the contracting work.¹¹ If an HSC provider is hiring subcontractors during the course of managing or superintending a construction contract, the HSC provider would need to be licensed as a contractor. However, merely hiring another person to carry out the work based on an indemnity agreement does not make an HSC a “contractor.”

CONCLUSION

Accordingly, it is my opinion that when one of the exemptions to § 38.2-2618 applies to a home service contract provider, including the exemption added in 2010,¹² the State Corporation Commission would not have the authority to bring an enforcement action under § 38.2-2627. It further is my opinion that the terms of the home service contract dictate whether a home service contract provider is considered to be a contractor. Should

a provider be considered to be a contractor, he must be licensed as a contractor pursuant to Chapter 11 of Title 54.1. Finally, it is my opinion that when home service contract providers are considered to be contractors, they must comply with Chapter 11 when they manage and superintend contractors and subcontractors to perform work under the home service contracts they administer. They are not required to comply with Chapter 11 merely by hiring a contractor or subcontractor.

¹ See 2010 Va. Acts ch. 235, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+ful+CHAP0235> (amending and reenacting § 38.2-2618). The amendments to § 38.2-2618 will become effective on July 1, 2010. See VA. CODE ANN. § 1-214 (requiring that “laws enacted at a regular session of the General Assembly ... shall take effect on the first day of July following the adjournment of the regular session”).

² See 2010 Va. Acts., *supra* note 1 (amending § 38.2-2618 to add new subsection C).

³ See VA. CODE ANN. § 38.2-2627 (2007).

⁴ See 2010 Va. Acts., *supra* note 1 (amending § 38.2-2618 to add new subsection C).

⁵ See § 38.2-2618 (2007); 2010 Va. Acts, *supra* note 1 (amending § 38.2-2618).

⁶ I note that Chapter 235 of the 2010 Virginia Acts of Assembly did not alter this definition.

⁷ *Bacigalupo v. Fleming*, 199 Va. 827, 833, 102 S.E.2d 321, 325 (1958) (interpreting, among others, § 54-113(2), predecessor to § 54.1-1100).

⁸ See VA. CODE ANN. § 54.1-1103(A) (2009).

⁹ See § 54.1-1115(A)(1) (2009).

¹⁰ See § 54.1-1100 (2009).

¹¹ See *Bacigalupo*, 199 Va. at 833, 102 S.E.2d at 325.

¹² See 2010 Va. Acts., *supra* note 1 (amending § 38.2-2618 to add new subsection C).

OP. NO. 10-066

INSURANCE: PROVISIONS RELATING TO INSURANCE POLICIES AND CONTRACTS – ASSIGNMENTS OF BENEFITS

Medical benefits are assignable to chiropractors who provide treatments covered by an automobile insurance policy.

Contract provisions restricting the assignment of benefits are unenforceable unless the assignment would alter the material risk of the insurer.

THE HONORABLE BILL JANIS
MEMBER, HOUSE OF DELEGATES
SEPTEMBER 24, 2010

ISSUES PRESENTED

You ask whether assignments of medical benefits payable under automobile insurance policies are enforceable where the policyholder assigns these benefits to a chiropractor who provided treatment covered by the policy. You also inquire whether clauses in automobile insurance policies that seek to bar these kinds of assignments are enforceable.

RESPONSE

It is my opinion that assignments of medical benefits payable under automobile insurance policies where the policyholder assigns these benefits to a chiropractor who provided treatment covered by the policy are enforceable. It is further my opinion that provisions of insurance contracts seeking to limit or preclude this kind of assignment are unenforceable so long as the assignment does not materially alter the risk or obligation of the insurer.

APPLICABLE LAW AND DISCUSSION

Generally, to effect a valid assignment, the assignor must not retain any control over the fund, property or other chose in action assigned or retain any right to revoke the assignment.¹ An assignment of a contractual right will be enforced unless it materially changes the duty of the obligor, is forbidden by statute, is contrary to public policy, or is validly precluded by contract.²

With regard to your first inquiry, assignments of the benefits you describe do not materially increase the insurer's obligation, because the costs of services remain the same regardless of whether the insured or the chiropractor is paid. Moreover, such assignments are not forbidden by any statute or case in Virginia. The Code expressly recognizes assignments of contractual rights,³ including payments under certain insurance contracts.⁴ As such, because Virginia law provides for these assignments, they cannot be deemed inoperative on grounds of public policy.⁵ I therefore conclude that, unless the assignment is validly precluded by the insurance agreement itself, the assignment you describe is enforceable under Virginia law.

You next inquire whether a clause in an insurance contract prohibiting the assignment of benefits would be enforceable under Virginia law. A distinction traditionally has been made between an assignment of an insurance policy *before* a loss is sustained and an assignment of benefits after the loss occurs. Courts have enforced contractual provisions prohibiting pre-loss assignments because pre-loss assignments involve a transfer of a contractual relationship that in most cases would materially increase the risk to the insurer, are enforceable.⁶ By contrast, assignments of post-loss benefits usually are found to be valid regardless of any non-assignment clause in the policy.⁷ This rule is explained by the fact that (1) post-loss assignments of the benefits due under the policy are viewed as transfers of a chose in action and public policy favors the free alienability of choses in action, and (2) such assignments would not materially increase the insurer's risk or obligation under the policy.⁸

CONCLUSION

Accordingly, it is my opinion that assignments of medical benefits payable under automobile insurance policies where the policyholder assigns these benefits to a chiropractor who provided treatment covered by the policy are enforceable. It is further my opinion that provisions of insurance contracts that seek to limit or to preclude this kind of assignment are unenforceable as long as the assignment does not materially alter the risk or obligation of the insurer.

¹ Kelly Health Care, Inc. v. Prudential Ins. Co. of Am., Inc., 226 Va. 376, 379, 309 S.E.2d 305, 307 (1983) (quoting Nusbaum & Co. v. Atlantic Realty, 206 Va. 673, 681, 146 S.E.2d 205, 210 (1966)). *See also* Lataif v. Com. Indus. Const., Inc., 223 Va. 59, 62, 286 S.E.2d 159, 160 (1982) (explaining that, to effect a valid assignment, an assignor's right to performance is extinguished and the assignee acquires the right to such performance).

² Restatement (Second) of Contracts § 317(2) (1981).

³ VA. CODE ANN. §§ 8.01-13 (2007) (allowing an assignee to bring an action in his own name that the assignor could have brought had he not made the assignment); 8.01-26 (2007) (allowing assignments for actions arising under contract).

⁴ *See* VA. CODE ANN. § 38.2-321 (2007) (stating that an insurer shall be fully discharged from all claims under a life insurance policy or an accident and sickness insurance policy when it makes payments in accordance with any written assignment to the person designated by the assignment as being entitled to the proceeds or payments).

⁵ Virginia law does limit the assignments of causes of action to those arising from damage to real or personal property and contracts, but there is no prohibition against assigning contractual rights under insurance policies. Section 8.01-26.

⁶ 3 STEVEN PITT, DANIEL MALDONADO & JOSHUA D. ROGERS, COUCH ON INURANCE. 3rd § 35:7 (2009) (“... the great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments thereof except with the consent of the insurer apply only to assignments before loss ... the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim.”); § 35:8 (contractual prohibition on assignment after loss is “generally regarded as void, in that it is against public policy to restrict the relation of debtor and creditor by restricting or rendering subject to the control of the insurer and absolute right in the nature of a chose in action.”).

⁷ *Id.* *See also* Aetna Ins. Co. v. Aston, 123 Va. 327, 333, 96 S.E. 772, 774 (1918). *See also* Crothall Hosp. Servs., Inc. v. Barham, 1 Va. Cir. 403, 406-07 (Henrico Cir. 1983). Some courts, in the context of health insurance litigation, have upheld prohibitions on the assignment of benefits. *See* Parrish Chiropractic v. Progressive Cas. Ins. Co., 874 P.2d 1049 (Colo. 1994) (citing cases). Your inquiry relates to automobile insurance and, therefore, the distinct considerations that apply to the assignment of benefits with certain health insurance policies are not implicated.

⁸ *Aston*, 123 Va. at 333, 96 S.E. at 774.

OP. NO. 09-071

LABOR AND EMPLOYMENT: DEPARTMENT OF LABOR AND INDUSTRY – PROTECTION OF EMPLOYEES

Federal law governing employment of unauthorized aliens explicitly and implicitly preempts any Virginia law that would impose civil or criminal sanctions upon persons employing such aliens; imposition of injunction constitutes civil sanction which is preempted by federal law.

THE HONORABLE THOMAS DAVIS RUST
MEMBER, HOUSE OF DELEGATES
FEBRUARY 2, 2010

ISSUE PRESENTED

You inquire whether federal law would preempt Virginia law imposing a “civil or criminal sanction” for hiring unauthorized aliens. Specifically, you ask whether federal law preempts § 40.1-11.1,¹ which prohibits the hiring of an unauthorized alien and

whether the Commissioner of Labor and Industry may seek an injunction prohibiting the hiring of unauthorized aliens pursuant to § 40.1-49.4(F)(2).

RESPONSE

It is my opinion that federal law governing the employment of unauthorized aliens explicitly and implicitly preempts any Virginia law that would impose civil or criminal sanctions upon persons employing such aliens. Further, it is my opinion that imposition of an injunction constitutes a civil sanction which is preempted by federal law.

BACKGROUND

Section 40.1-6 designates the powers and duties of the Commissioner of Labor and Industry (the “Commissioner”). Section 40.1-11.1 declares unlawful the employment of unauthorized aliens,² but it is your understanding that the enforcement of § 40.1-11.1 is preempted by 8 U.S.C. § 1324a(h)(2). However, you note that § 40.1-49.4(F)(2) authorizes the Commissioner to petition a circuit court to enjoin any violation of Title 40.1. You suggest the Commissioner could use such authority to petition the court to enjoin a violation of § 40.1-11.1 for persons hiring unauthorized aliens. You further suggest that such action effectively would circumvent the federal law because an injunctive remedy would not constitute a civil or criminal sanction.

APPLICABLE LAW AND DISCUSSION

I. THE SUPREMACY CLAUSE AND FEDERAL PREEMPTION

The Supremacy Clause of the Constitution of the United States declares that the “Constitution, and the Laws of the United States” “shall be the supreme Law of the Land,” notwithstanding the laws of any state to the contrary.³ Therefore, to the extent that state or local laws or ordinances conflict with or are contrary to federal law, they are preempted by federal law. Moreover, in many cases, even where a state or local law or ordinance occupies the same field of law,⁴ to the extent that a federal law dominates that field, the state or local law is preempted.

Several distinct doctrines have developed in Supremacy Clause jurisprudence.⁵ First, “[e]xpress preemption” applies where Congress explicitly declares that a federal law is intended to supersede state law.⁶ A second doctrine, implied preemption, takes two forms—field preemption and conflict preemption. Field preemption exists “if federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”⁸ Conflict preemption acts to void⁹ any state statute or local ordinance to the extent it conflicts with a federal statute. Conflict preemption recognizes that “to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.”¹⁰

It is “an established principle that an intention of the Congress of the United States to exclude the states from exerting their police power must be clearly manifested.”¹¹ In addition, Congress may limit its preemption of state and local regulation of a particular field.¹² When Congress chooses to limit its preemption, state regulation outside of the limitation is not forbidden or replaced.¹³ However, where a field of law traditionally has

not been the exclusive province of the states, such as in the area of immigration law, field preemption by federal law can be implicit, despite a narrow limitation.¹⁴

II. THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

Congress has asserted federal authority over immigration and naturalization of aliens and their employment.¹⁵ The federal Immigration Reform and Control Act of 1986¹⁶ (“IRCA”) presents a “comprehensive scheme prohibiting the employment of illegal aliens in the United States.”¹⁷ IRCA “forcefully” makes combating the employment of illegal aliens central to immigration law,¹⁸ which “is plainly a field in which the federal interest is dominant.”¹⁹ IRCA has established an extensive employment verification system to prevent employment of illegal aliens.²⁰ To enforce this public policy, “IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work.”²¹ Federal immigration law distinguishes among various categories of visas thereby determining which noncitizens legally are authorized to work in the United States.²²

“Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening [the] explicit ... policies” mandated by IRCA.²³ An employee would have to provide false documentation to the prospective employer or the employer would have to fail in his duty to check the employee’s documentation. If an employer unknowingly hires an unauthorized alien, he must discharge the alien upon discovery of the unauthorized status.²⁴ Employers who violate IRCA are subject to civil fines.²⁵

As part of the “comprehensive scheme” to combat the employment of illegal aliens, IRCA provides that “[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”²⁶ Therefore, Congress clearly has demonstrated its intent to preempt state and local laws imposing civil or criminal sanctions upon persons or companies that employ or recruit unauthorized aliens or accept a fee to refer such aliens for employment, except for licensing and similar laws.

III. INJUNCTIVE RELIEF AND FEDERAL PREEMPTION

In 8 U.S.C. § 1324a(h)(2), Congress explicitly “preempt[s] any State or local law imposing civil or criminal sanctions ... upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”²⁷ A civil injunction is “[a] court order commanding or preventing an action.”²⁸ A “sanction” is “[a] penalty or coercive measure that results from failure to comply with a law, rule, or order.”²⁹ Injunctions commonly are understood to constitute a sanction.³⁰ Therefore, if granted, a civil injunction to enforce Virginia’s statute prohibiting the hiring of unauthorized aliens would constitute a sanction, which explicitly is preempted by 8 U.S.C. § 1324a(h)(2).³¹

Although § 40.1-49.4(F)(2), empowers the Commissioner to petition a circuit court to enjoin any violation of Title 40.1, he may not circumvent the federal preemption simply by seeking to enjoin an employer from hiring unauthorized aliens. The Commissioner

may not obtain an injunction because such an action is a civil sanction that is prohibited, *i.e.* preempted, by IRCA.³²

Although IRCA would preempt the award of injunctions to police immigration laws, the statute contains a “savings” clause that permits states and localities to address immigration violations through “licensing and similar laws.”³³ Courts are divided on whether to read that provision narrowly or broadly.³⁴ Moreover, the Commissioner or a locality certainly may notify an employer that it is in violation of immigration law. Additionally, the Commissioner may inform such employer that if the violation is not redressed, he will report the violation to Immigration and Customs Enforcement.

CONCLUSION

Accordingly, it is my opinion that federal law governing the employment of unauthorized aliens explicitly and implicitly preempts any Virginia law that would impose civil or criminal sanctions upon persons employing such aliens. Further, it is my opinion that imposition of an injunction constitutes a civil sanction which is preempted by federal law.

¹For purposes of this opinion, all references to federal code sections will be identified with the appropriate reference to the United States Code (“U.S.C.”). Statutes listed without the U.S.C. designation refer to the *Virginia Code*.

²Section 40.1-11.1 provides, in pertinent part, that “[i]t shall be unlawful and constitute a Class 1 misdemeanor for any employer or any person acting as an agent for an employer, or any person who, for a fee, refers an alien who cannot provide documents indicating that he or she is legally eligible for employment in the United States for employment to an employer, or an officer, agent or representative of a labor organization to knowingly employ, continue to employ, or refer for employment any alien who cannot provide documents indicating that he or she is legally eligible for employment in the United States.”

³U.S. CONST. art. VI, cl. 2.

⁴*See Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219, 240 (2d Cir. 2006).

⁵*See Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1255 (N.Y. 2006).

⁶*Id.*

⁷*Id.*

⁸*Id.* (citations omitted). “Congress’s intent to preempt state law may be implied where it has designed a pervasive scheme of regulation that leaves no room for the state to supplement, or where it legislates in “a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject.”” *Silva*, 469 F.3d at 240 (citations omitted).

⁹*Balbuena*, 845 N.E.2d at 1255.

¹⁰*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) (noting state regulation must yield to federal regulation in context of National Labor Relations Act).

¹¹*Nat’l Mar. Union v. Norfolk*, 202 Va. 672, 677, 119 S.E.2d 307, 311 (1961).

¹²*Id.*

¹³*Id.*

¹⁴*See Balbuena*, 845 N.E.2d at 1256 (noting that although IRCA and other federal statutes occupy full spectrum of immigration law, nothing indicates that Congress meant to affect state regulation of occupational health and safety; states possess broad authority under police powers).

¹⁵*Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

¹⁶Pub. L. No. 99-603, 100 Stat. 3359.

¹⁷*See Hoffman*, 535 U.S. at 147; *see also Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 821 (Md. 2005)

(noting characterization of IRCA as comprehensive scheme).

¹⁸ See *Hoffman*, 535 U.S. at 147; *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 (1991).

¹⁹ *Silva*, 469 F.3d at 240.

²⁰ See *Hoffman*, 535 U.S. at 147.

²¹ *Id.* at 148 (citing 8 U.S.C. § 1324a(b)).

²² *Baker v. IBP, Inc.*, 357 F.3d 685, 689 (7th Cir. 2004).

²³ See *Hoffman*, 535 U.S. at 148 (citing 8 U.S.C. § 1324a(b)).

²⁴ *Id.*

²⁵ *Id.*

²⁶ 8 U.S.C.S. § 1324a(h)(2) (LexisNexis 2007).

²⁷ Congress expressly limits its preemption by providing an exception for "licensing and similar laws." 8 U.S.C.S. § 1324a(h)(2). State licensing and similar laws traditionally have been implemented in the exercise of a state's police powers in protection of the public health, safety, and welfare. See, e.g., VA. CODE ANN. § 54.1-100 (2009) (providing for regulation of professions and occupations for purpose of protecting public health, safety, and welfare).

²⁸ BLACK'S LAW DICTIONARY 855 (9th ed. 2009).

²⁹ *Id.* at 1458.

³⁰ See, e.g., *SEC v. M & A West Inc.*, 538 F.3d 1043, 1055 (9th Cir. 2008); *United States v. Brennan*, 395 F.3d 59, 72 (2d Cir. 2005) (describing injunctions as civil sanctions).

³¹ See *CIBA Corp. v. Weinberger*, 412 U.S. 640, 644 (1973) (describing civil injunction proceedings, criminal penalties, and *in rem* seizure and condemnation as types of sanctions that could be applied in enforcement of Federal Food, Drug, and Cosmetic Act); *Retail Clerks Int'l Assoc. v. Schermerhorn*, 375 U.S. 96, 100 (1963) (indicating that injunctions constitute one of wide variety of sanctions, also including damage suits and criminal penalties); *United States v. United States Gypsum Co.*, 340 U.S. 76, 82 (1950) (noting that court order included "sanction of an injunction against violation of the" order); *PFS Distribution Co. v. Raduechel*, 574 F.3d 580, 598 (8th Cir. 2009) (describing preliminary injunction as sufficient sanction for certain conduct).

³² See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 533 (M.D. Pa. 2007) (holding that IRCA preempts municipal ordinance governing illegal immigrants).

³³ 8 U.S.C.S. § 1324a(h)(2).

³⁴ See *Lozano*, 496 F. Supp. 2d at 520, 533 (invalidating city licensing scheme as incompatible with IRCA); *but see Chicanos Por La Causa v. Napolitano*, 558 F.3d 856 (9th Cir. 2009) (upholding Arizona licensing scheme against facial challenge), *petition for cert. filed sub nom. Chamber of Commerce v. Candelaria*, 130 S. Ct. 534 (U.S. Nov. 2, 2009) (No. 09-115).

OP. NO. 10-036

LIBRARIES: LAW LIBRARIES.

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS.

Clerk may enter into private subscription agreements: (1) where local bar rules provide such authority, and court permits; (2) where local governing body has authorized it; or (3) pursuant to clerk's statutory authority to purchase such services. Metal detector screenings and door locks do not necessarily negate requirement that library be open to public.

THE HONORABLE JACK KENNEDY

CLERK OF THE CIRCUIT COURT FOR WISE COUNTY AND CITY OF NORTON

MAY 6, 2010

ISSUES PRESENTED

You ask several questions in connection with a law library established by court order. First, you ask whether a clerk of the court (“clerk”) has the authority to enter into private service subscription agreements for case law access following entry of a court’s order. Next, you inquire whether a clerk has the discretion and authority to determine the subscription services to be contracted for the law library pursuant to such court order assuming the governing board would approve payment pursuant to § 42.1-65. Finally, you ask whether the requirement for a public law library is negated by one or two combination lock doors and metal detector screenings.

RESPONSE

It is my opinion that a clerk may enter into private subscription agreements: (1) where local bar rules provide such authority, and the court permits the clerk to do so; (2) where the local governing body has authorized it; or (3) pursuant to the statutory authority vested in the clerk to purchase such services. Further, it is my opinion that metal detector screenings and door locks do not necessarily negate the requirement that a library be open to the public.

BACKGROUND

You state that on March 17, 2010, the Circuit Court for Wise County (“County”) and Norton City (“City”) entered an order providing that you, as Clerk of the Circuit Court, should manage and expand the Wise County Law Library. The order tasks you to determine the needs of the Library, to confer with the executive committee of the local bar to seek recommendations regarding Library resources, including books and equipment, and to confer with County officials concerning funding for the Library. Therefore, you seek guidance concerning your authority related to these duties.

APPLICABLE LAW AND DISCUSSION

Section 42.1-65(A) provides that a clerk will, under specified circumstances, “take charge” of the local law library. You ask whether a clerk may enter into private subscription agreements for case law access; if so, you ask what discretion and authority a clerk has to determine the subscription services for which he may contract. First, when “the rules prescribed by the bar and approved by the court”¹ authorize a clerk to enter into such an agreement, the clerk may do so. The scope of the clerk’s authority will be determined by the terms of these rules.

Next, you ask about the funding related to such subscription agreements. I note that funding may be obtained from several sources. First, § 42.1-70 allows the imposition of a sum, not to exceed four dollars, “as part of the costs incident to each civil action filed in the courts located within its boundaries.”² This source of funding requires the local governing body to enact an ordinance providing for this sum.³ After a local governing body has established the additional fee for civil actions, “[t]he governing body is authorized to accept contributions to the [library] fund from any bar association.”⁴ It is

up to the local governing body to make disbursements for the acquisition of legal materials.⁵ When a clerk seeks funding from this source, prudence would dictate that he obtain approval from the governing body in advance of expenditures.

I find no statutes that would preclude either the local bar or the City or County⁶ from allocating funds toward a locality's law library. In that circumstance, a clerk may spend the funds "according to the rules prescribed by the bar and approved by the court."⁷

An additional and separate source of authority and funding is found in § 42.1-65(C), which provides that the local law library "may purchase or lease computer terminals for the purpose of retrieving available legal reference data, and if so, ... may include use of a flat rate or fee structure, for the use of computer research services." The fees to be charged "shall be sufficient to cover the expenses of such services."⁸ Further, § 42.1-65 exempts from the fee use of the computers by "the courts, attorneys for the Commonwealth and public defenders, and their assistants."⁹ Therefore, a clerk could enter into an agreement for "computer research services" and assess a fee to cover the costs of the subscription agreement.

Finally, you ask whether metal detector screenings and locks on a library's doors would negate or violate the requirement that the library be public. Section 42.1-70 contemplates that the local law library will be public.¹⁰ The fact that members of the public may be subjected to metal detector screenings does not prevent the public from gaining access to the library. Section 42.1-65(A)-(B) contemplates that the library may be kept in the courthouse. Courthouses nearly always are equipped with metal detectors, yet no one would deny that courthouses are public buildings. Therefore, the presence of metal detectors does not negate public access to the library. The fact that there may be combination locks does not necessarily close the library to the public. Provided that the library remains "open for the use of the public at hours convenient to the public,"¹¹ the presence of locks, in the abstract, does not transform the library into one that is closed to the public.

CONCLUSION

Accordingly, it is my opinion that a clerk may enter into private subscription agreements: (1) where local bar rules provide such authority, and the court permits the clerk to do so; (2) where the local governing body has authorized it; or (3) pursuant to the statutory authority vested in the clerk to purchase such services. Further, it is my opinion that metal detector screenings and door locks do not necessarily negate the requirement that a library be open to the public.

¹ VA. CODE ANN. § 42.1-65(A) (Supp. 2009).

² Section 42.1-70 (Supp. 2009).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See VA. CODE ANN. § 15.2-953(B) (2008) (providing that localities may make gifts and donations to nonprofit foundations that support local libraries).

⁷Section 42.1-65(A).

⁸Section 42.1-65(C).

⁹*Id.*

¹⁰See § 42.1-70 (2009) (permitting acquisition of books and computer equipment “to maximize access to the law library by the public” and providing that library should be “open for the use of the public”).

¹¹*Id.*

OP. NO. 10-035

MINES AND MINING: THE VIRGINIA GAS AND OIL ACT—GAS OIL AND CONSERVATION

Proposed legislation does not expand the authority of Virginia Gas and Oil Board; Board is not authorized to decide property rights based on the interpretation of deeds and contracts.

Mr. Bradley C. Lambert
Chairman, Virginia Gas & Oil Board
June 24, 2010

ISSUE PRESENTED

You ask whether pursuant to Senate Bill 376, as enacted by the 2010 Session of the General Assembly, the Virginia Gas and Oil Board is authorized to render decisions and issue orders to determine property rights based on the interpretation of deeds and contracts.

RESPONSE

It is my opinion that Senate Bill 376 does not expand the authority of the Virginia Gas and Oil Board to decide ownership claims involving conflicting claimants to gas royalties, property rights disputes, or contract interpretation.

APPLICABLE LAW AND DISCUSSION

The Virginia Gas and Oil Board (“Board”) is a citizen board staffed by the Division of Gas and Oil (“Division” or “DGO”) within the Department of Mines, Minerals and Energy (“DMME”).² Among other responsibilities, the Board is tasked with approving or denying applications allowing for compulsory pooling or unitization for unleased interests in gas well drilling units.³

When units include owners who are unknown or who cannot be located, or when there are conflicting claims of ownership of the gas resource or the land in the forced pooled unit, any royalties payable by the operators to those possible owners are paid into an escrow account established by the Board.⁴ Royalties claimed by conflicting or unknown claimants are held in the Board’s escrow account until the conflicting claims can be resolved by agreement between the parties or by court order.⁵

The General Assembly has not delegated to DMME or that agency's divisions and boards the power to decide matters involving interpretation of contracts or deeds. Indeed, the Act contains a specific cautionary directive to the Board emphasizing its lack of authority to make decisions based on contract or deed interpretations:

The factors in subsection C of [§ 45.1-361.11] are not intended to and shall not be construed to authorize the Director, or the Board under § 45.1-361.36, to supersede, impair, abridge or affect any contractual rights or obligations now or hereafter existing between the respective owners of coal and gas or any interest therein.^[6]

The most conclusive evidence of the legislature's continuing intent to limit the Board's jurisdiction, is found in § 45.1-361.22(5), which provides that:

The Board *shall order payment* of principal and accrued interest, less escrow account fees, from the escrow account to conflicting claimants *only after* (i) a final decision of a court of competent jurisdiction adjudicating the ownership of coalbed methane gas as between them or (ii) an agreement among all claimants owning conflicting estates in the tract in question or any undivided interest therein. [Emphasis added.]

This language is clear and unambiguous and the statute must be interpreted according to that plain meaning.⁷

The 2010 Session of the General Assembly revisited this statute and enacted significant revisions, including adding a third avenue for claimants seeking payment out of escrow arbitration by agreement of all affected parties.⁸ It is essential to note, however, that the General Assembly did not change the wording of § 45.1-361.22(5) that provides for payments from escrow "*only after*" one of the now three contingencies has occurred. Thus, the power of the Board to pay out escrowed funds in conflicting claims situations remains limited to the three enumerated situations.⁹

The 2010 Session of the General Assembly also enacted Senate Bill 376.¹⁰ This legislation creates a new statute, § 45.1-361.21:1, and provides, in relevant part, that:

A conveyance, reservation, or exception of coal shall not be deemed to include coalbed methane gas. Nothing in this section shall affect a coal operator's right to vent coalbed methane gas for safety purposes or release coalbed methane gas in connection with mining operations. The provisions of this section shall not affect any settlement of any dispute, or any judgment or governmental order, as to the ownership or development of coalbed methane gas made or entered prior to the enactment of this provision.^[11]

Nothing in the plain language of this enactment purports to create new authority or to expand the existing authority of the Board to adjudicate mineral ownership rights.

CONCLUSION

Accordingly, it is my opinion that Senate Bill 376 does not expand the authority of the Virginia Gas and Oil Board to decide ownership claims involving conflicting claimants to gas royalties, property rights disputes, or contract interpretation.

¹ 2010 Va. Acts ch. 730.

² See VA. CODE ANN. § 45.1-361.1 through 45.1-361.26 (2002 & Supp. 2009). The current Act has an extensive legislative record that has been outlined in prior opinions of the Attorney General. See Op. Va. Att’y Gen.: 2009 at 94; *id.* at 102.

³ See Sections 45.1-361.21, 45.1-361.22; see also Sections 45.1-361.14, 45.1-361.15 (setting forth general and specific duties of the board. Although the term “compulsory pooling” is not defined in the Code, it is a term of art in the gas and oil industry and, for purposes of this Opinion, the term means the pooling of interests within a drilling unit pursuant to § 45.1-361.21 or § 45.1-361.22). See also 2009 Op. Va. Att’y Gen. 94, 94. The federal government provides for a “compulsory unitization” and requires “lessees to unitize operations...if unitized operations are required” to prevent waste, conserve natural resources, or protect correlative rights. See 30 C.F.R. § 250.1301(b) (2008).

⁴ Sections 45.1-361.21(D), 45.1-361.22(2).

⁵ Section 45.1-361.22(5).

⁶ Section 45.1-361.11 (2002).

⁷ *Browning-Ferris Indus. v. Residents Involved in Saving the Env’t.*, 254 Va. 278, 284, 492 S.E.2d 431, 435 (1997).

⁸ 2010 Va. Acts ch. 442.

⁹ “In determining legislative intent, the rule is clear that where a power is conferred and the mode of its execution is specified, no other method may be selected; any other means would be contrary to legislative intent and, therefore, unreasonable.” *Commonwealth v. County Bd. of Arlington Cty.*, 217 Va. 558, 577, 232 S.E.2d 30, 37 (1977). “Where a power is expressly set out in a statute ... another power will not be inferred.” *Harris v. USAA Casualty Ins. Co.*, 37 Va. Cir. 553, 572 (Norfolk Cir. 1994).

¹⁰ Senate Bill 376 was signed into law April 13, 2010, and became effective immediately due to an emergency enactment clause. 2010 Va. Acts ch. 730.

¹¹ *Id.*

OP. NO. 10-092

MOTOR VEHICLES: LICENSURE OF DRIVERS – OBTAINING LICENSE, GENERALLY

Department of Motor Vehicles has authority to accept or refuse an Employment Authorization Document standing alone as evidence of legal presence. Department has no authority to revoke license upon licensee’s subsequent subjection to deportation proceedings, but may require licensee to again provide proper documentation upon application for license renewal.

MR. RICHARD D. HOLCOMB

COMMISSIONER, VIRGINIA DEPARTMENT OF MOTOR VEHICLES

NOVEMBER 12, 2010

ISSUES PRESENTED

You ask three interrelated questions concerning the authority of the Department of Motor Vehicles (the “Department”) in implementing the provisions of § 46.2-328.1, which

require an applicant to present valid documentary evidence of lawful status in the United States in order to obtain a driver's license, permit or special identification card ("ID card") from the Department. You first inquire whether the Department has the authority to accept or to refuse to accept the Employment Authorization Document,¹ standing alone, as documentary evidence of lawful status as required by § 46.2-328.1. Second, you ask what steps the Department may take pursuant to § 46.2-328.1 with regard to an individual who has been issued a Virginia driver's license, permit or ID card in accordance with § 46.2-328.1, but who subsequently has become subject to removal or deportation proceedings under federal law. Finally, you ask whether the Department is authorized under § 46.2-328.1 to cancel the driver's license, permit or ID card of that individual if he has been deported by federal authorities.

RESPONSE

It is my opinion that the Department has authority to accept or to refuse to accept an Employment Authorization Document, standing alone, as documentary evidence of lawful status in the United States as required by § 46.2-328.1. It is further my opinion that the Department is not authorized to take any steps with regard to an individual who has been issued a driver's license, permit, or ID card in accordance with § 46.2-328.1, but who has subsequently become subject to removal or deportation proceedings, other than to require such individual, when application for a renewal, duplicate or reissue of the license, permit, or ID card is made to the Department, to provide again documentary evidence of lawful status, provided that the Department has been notified by a government agency that the individual is not legally in the United States. Finally, it is my opinion that § 46.2-328.1 is designed solely to require documentary evidence of lawful status in the United States at the time of application for a driver's license, permit, or ID card, and that there is no authority under § 46.2-328.1 for the Department to cancel a driver's license, permit, or ID card once it is issued in accordance with § 46.2-328.1, even if the individual has been deported.

BACKGROUND

The General Assembly enacted § 46.2-328.1 in 2003, to become effective January 1, 2004.² In anticipation of the law's implementation, the Department created a list of documents it determined would be acceptable documentary evidence of lawful status in the United States as required by § 46.2-328.1, which provided then, and provides today, that:

A. [T]he Department shall not issue an original license, permit, or special identification card to any applicant who has not presented to the Department, with the application, valid documentary evidence that the applicant is either (i) a citizen of the United States, (ii) a legal permanent resident of the United States, or (iii) a conditional resident alien of the United States.

B. Notwithstanding the provisions of subsection A and the provisions of §§ 46.2-330 and 46.2-345, an applicant who presents in person valid documentary evidence of (i) a valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States, (ii) a pending

or approved application for asylum in the United States, (iii) entry into the United States in refugee status, (iv) a pending or approved application for temporary protected status in the United States, (v) approved deferred action status, or (vi) a pending application for adjustment of status to legal permanent residence status or conditional resident status, may be issued a temporary license, permit, or special identification card. Such temporary license, permit, or special identification card shall be valid only during the period of time of the applicant's authorized stay in the United States or if there is no definite end to the period of authorized stay a period of one year....

Among the documents on that original list of documents the Department determined should be acceptable as evidence of lawful status was the Employment Authorization Document ("EAD"). The EAD remained on the Department's list of acceptable documents (which is posted on the Department's website as part of form "DMV 141") until September of 2010, when it was temporarily removed from the list. The Department took this action based on information it received indicating that the EAD might not be trustworthy evidence of lawful status in the United States.

The purpose of the EAD, popularly known as a "work permit," is to provide evidence to employers that the holder is authorized by the United States Citizenship and Immigration Services ("USCIS") to work in the United States.³

APPLICABLE LAW AND DISCUSSION

It should be noted that § 46.2-328.1 nowhere states what documents should be considered "valid documentary evidence" for purposes of establishing citizenship or lawful residency. Because of the lack of guidance in the statute, it is my opinion that the Department, of necessity, must first determine which documents should be considered acceptable as evidence of lawful status as provided in § 46.2-328.1. So long as the Department's determinations were reasonably related to the purpose for which the statute was enacted and were not in conflict with other laws, those determinations would be considered a valid exercise of that authority.⁴

It also should be noted that at the time § 46.2-328.1 was enacted, there were few, if any, other states that required documentary evidence of lawful status in the United States in order to obtain a driver's license or ID card. The Department, therefore, had little or no guidance as to what documents might have been considered acceptable in other jurisdictions. In 2003, the Department evidently had little reason to suspect that the EAD was not trustworthy evidence of lawful status in the United States, and so its policy of accepting the EAD for that purpose was reasonable and within the authority granted to the Department pursuant to § 46.2-328.1.

The Department similarly has the authority to refuse to accept this document as evidence of lawful status in the United States as required by § 46.2-328.1, particularly when it concludes that the EAD does not provide trustworthy evidence of lawful presence in the United States.⁵ This conclusion is supported by a decision of the United States District Court for the Eastern District of Virginia.⁶ In addressing whether one of the plaintiffs

had standing, the Court held that the plaintiff did not have standing to bring the suit because he was an illegal alien with no lawful status in the United States, even though he had a valid EAD. The EAD had been issued to him after he had filed for a special rule cancellation of removal under 8 C.F.R. § 240.66(a). The court held that:

While authorization to work in the United States implies some form of authorization to be in the United States, it does not necessarily mean that an alien enjoys lawful status in the United States.

. . . because [the plaintiff] is removable from the United States and is not in a period of stay authorized by the Attorney General, [the plaintiff] is an illegal alien under federal law.⁷

The Department, acting within its authority to accept reliable documentation of lawful presence, could, like the United States District Court, conclude that an EAD will not always be evidence of lawful status in the United States. Consistent with this decision, the United States Department of Homeland Security, in regulations adopted in 2008,⁸ likewise has indicated that the EAD should not be considered, by itself, as evidence of lawful status in the United States.⁹

Accordingly, it is my opinion that the Department, having reasonably determined in 2003 that the EAD would be acceptable as documentary evidence of lawful status in the United States, retains authority to revisit that determination. If it now concludes that the EAD is not reliable evidence of lawful status in the United States, the Department reasonably may determine that the EAD, by itself, will not be acceptable as documentary evidence pursuant to § 46.2-328.1. In that regard, it should be noted that the EAD may sometimes be an indicator of lawful status in the United States, but that is not its primary purpose as a document. Any person who holds an EAD and who is also in a lawful status as provided in § 46.2-328.1 should be able to produce other documentary evidence of that lawful status in addition to the EAD. The Department continues to list a significant number of documents on its website that it continues to consider acceptable and which should be available to an applicant who actually is in lawfully present in the United States.¹⁰

As to your second and third inquiries, § 46.2-328.1 was enacted solely as a requirement that the individual provide valid documentary evidence of lawful status in the United States at the time of application for a driver's license, permit or ID card. The only sanction for failing to provide appropriate documentation is that no such driver's license, permit or ID card will be issued to the applicant by the Department. There is nothing in § 46.2-328.1, or elsewhere in the Code, that requires the individual to retain lawful status at all times during the validity period of a driver's license, permit, or ID card. The Code does not authorize the Department to impose any sanction for failure to maintain lawful status during the validity period of a driver's license, permit, or ID card lawfully issued pursuant to § 46.2-328.1. A change in the Code would be required to provide the DMV with such authority. The Code does require, in situations where the Department has been notified by a government agency that the applicant is not legally in the United States, that the person again show valid documentary evidence of lawful status in the United States upon application for renewal or the issuance of a duplicate or reissued driver's license, permit or ID card (and that the application be denied if he is unable to present such

evidence).¹¹ Aside from that provision, nothing authorizes the Department to cancel a driver's license, permit, or ID card on the ground that the person is in removal or deportation proceedings, or even if he has been deported.

CONCLUSION

Accordingly, it is my opinion that the Department has authority to accept or to refuse to accept an Employment Authorization Document, standing alone, as documentary evidence of lawful status as required by § 46.2-328.1. It is further my opinion that the Department is not authorized to take any steps with regard to an individual who has been issued a driver's license, permit, or ID card in accordance with § 46.2-328.1, but who has subsequently become subject to removal or deportation proceedings, other than to require that individual, when application for a renewal, duplicate or reissue of the driver's license, permit or ID card is made to the Department, to again provide documentary evidence of lawful status, provided that the Department has been notified by a government agency that the individual is not legally in the United States. Finally, it is my opinion that § 46.2-328.1 is designed solely to require documentary evidence of lawful status in the United States at the time of application for a driver's license, permit, or ID card, and that there is no authority under § 46.2-328.1 for the Department to cancel a driver's license, permit or ID card once it is issued in accordance with § 46.2-328.1, even if the individual has been deported.

¹ The Employment Authorization Document is Form I-765, issued by the United States Citizenship and Immigration Services bureau of the United States Department of Homeland Security.

² 2003 Va. Acts chs. 817, 819.

³ See Instructions for I-765, Application for Employment Authorization, available at www.uscis.gov. See also 8 C.F.R. § 274a.13 (2010).

⁴ The interpretation given to a statutory provision by the state agency charged with its enforcement is entitled to great weight. See *Forst v. Rockingham*, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981) (according great weight to State Tax Commissioner's longstanding interpretation of statute). The General Assembly is presumed to be aware of the Department's interpretation of this statute and of the list of documents the Department determined to be acceptable as evidence of lawful status under § 46.2-328.1, a list that has been posted on the Department's website since the effective date of the statute. When, as here, an agency's interpretation of a statute has long continued without triggering legislative change, the General Assembly will be presumed to have acquiesced. See *Peyton v. Williams*, 206 Va. 595, 600-01, 145 S.E.2d 147, 151 (1965) (upholding state penitentiary superintendent's computation of term of confinement as reasonable and not in conflict with statute).

⁵ The EAD is often assumed to indicate that the person to whom it is issued is lawfully present in the United States. You have indicated that at present a significant number of states accept the EAD, standing alone, as evidence of legal presence or lawful status under their driver licensing laws, which now, unlike in 2003, almost universally require evidence of legal presence or lawful status in the United States before a license or ID card will be issued.

⁶ See *Equal Access Educ. v. Merten*, 325 F. Supp. 2d 655 (E.D. Va. 2004).

⁷ *Id.* at 664-65.

⁸ 6 C.F.R. § 37.11 (g)(2) (2010).

⁹ 73 Fed. Reg. 5333 (Jan. 29, 2008).

¹⁰ I note further that the Department has on its website not only the "DMV 141" but also an interactive program entitled "Document Guide for Driver's Licenses and ID Cards" with which applicants can easily discover which documents they might have that will be acceptable as evidence of lawful status. See <https://www.dmv.virginia.gov/apps/documentbuilder/intro.aspx>

¹¹ Subsection C of § 46.2-328.1 provides that: “C. Any license or special identification card for which an application has been made for renewal, duplication or reissuance shall be presumed to have been issued in accordance with the provisions of subsection A, provided that, at the time the application is made, (i) the license or special identification card has not expired or been cancelled, suspended or revoked or (ii) the license or special identification card has been cancelled or suspended as a result of the applicant having been under medical review by the Department pursuant to § 46.2-322. The requirements of subsection A shall apply, however, to a renewal, duplication or reissuance if the Department is notified by a local, state or federal government agency that the individual seeking such renewal, duplication or reissuance is neither a citizen of the United States nor legally in the United States.” As I understand it, the Department has interpreted subsection C to mean that applicants for renewal or for a duplicate or reissued license do not have to provide documentary evidence of lawful presence, unless the license or ID Card has expired or been cancelled, suspended, or revoked, or unless the Department has been notified that the applicant is neither a citizen of, nor legally in, the United States. Accordingly, if an individual has lost lawful status in the United States after being issued a driver’s license, permit, or ID card, then the Department should require the individual to show again evidence of lawful status upon application for renewal, provided that the Department has been notified by a government agency that the individual is not legally in the United States. If the Department has not been so notified, then it could not act pursuant to that provision. And there is no other provision in § 46.2-328.1 that addresses any other sanction for failure to maintain lawful status while holding a driver’s license, permit, or ID card.

OP. NO. 10-018

MOTOR VEHICLES: LICENSURE OF DRIVERS – SUSPENSION AND REVOCATION OF LICENSES, GENERALLY; ADDITIONAL PENALTIES

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY – DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED

Commissioner of Department of Motor Vehicles is both authorized and mandated to impose ignition interlock system requirements upon individual seeking reinstatement of driver's license after three-year license revocation period resulting from conviction for driving under influence, second or subsequent offense, when convicting court fails to order installation of such system.

THE HONORABLE JOSEPH P. JOHNSON, JR.

MEMBER, HOUSE OF DELEGATES

APRIL 20, 2010

ISSUE PRESENTED

You ask whether the Department of Motor Vehicles (“Department”) has the authority to impose an ignition interlock system upon an individual seeking reinstatement of his driver’s license after the three-year license revocation period resulting from a conviction of second offense driving under the influence (“DUI”). You note that the convicting court did not impose such a requirement.¹

RESPONSE

It is my opinion that the Commissioner of the Department of Motor Vehicles is both authorized and mandated to impose an ignition interlock system upon an individual seeking reinstatement of a driver’s license after the three-year license revocation period

resulting from a conviction for driving under the influence, second or subsequent offense, when the convicting court fails to order the installation of such system.

APPLICABLE LAW AND DISCUSSION

The responsibility for ordering ignition interlock systems initially falls to the court. Article 2, Chapter 7 of Title 18.2, §§ 18.2-266 through 18.2-273 (codified in scattered sections), contains the penalties, sanctions, and requirements related to driving a motor vehicle while under the influence of alcohol. Section 18.2-270.1(B) provides, in part, that a court:

shall, for a second or subsequent offense [under § 18.2-266²] ... as a condition of a restricted license or as a condition of license restoration under subsection C of § 18.2-271.1 or 46.2-391, prohibit an offender from operating a motor vehicle that is not equipped with a functioning, certified ignition interlock system for any period of time not to exceed the period of license suspension and restriction, not less than six consecutive months without alcohol-related violations of the interlock requirements, and shall require that such a system be installed on each motor vehicle, as defined in § 46.2-100, owned by or registered to the offender, in whole or in part, for such period of time. Such condition shall be in addition to any purposes for which a restricted license may be issued pursuant to § 18.2-271.1.

Section 18.2-270.1(B) specifically refers to § 18.2-271.1(C), which provides, in pertinent part, that:

Upon conviction of a violation of § 18.2-266 or any ordinance of a county, city or town similar to the provisions thereof, or subsection A of § 46.2-341.24, the court shall impose the sentence authorized by § 18.2-270 or § 46.2-341.28^[3] and the license revocation as authorized by § 18.2-271. In addition, if the conviction was for a second offense committed within less than ten years after a first such offense, the court shall order that restoration of the person's license to drive be conditioned upon the installation of an ignition interlock system on each motor vehicle, as defined in § 46.2-100, owned by or registered to the person, in whole or in part, for a period of six months beginning at the end of the three year license revocation, unless such a system has already been installed for six months prior to that time pursuant to a restricted license order under subsection E of this section.

Finally, as a backstop to these provisions, § 46.2-391.01 provides that:

If the court, as a condition of license restoration or as a condition of a restricted license under subsection C of § 18.2-271.1 or § 46.2-391, fails to prohibit an offender from operating a motor vehicle that is not equipped with a functioning, certified ignition interlock system upon the offender's conviction of a second or subsequent offense under § 18.2-51.4 or § 18.2-266 or a substantially similar ordinance of any

county, city or town, the Commissioner [of DMV] shall enforce the requirements relating to installation of such systems in accordance with the provisions of § 18.2-270.1.^[4]

I note that each of the three statutes uses the word “shall” in relation to prohibition, imposition, or enforcement of the ignition interlock system requirements. The use of the word “shall” in a statute generally indicates that the procedures are intended to be mandatory.⁵ Therefore, it is my opinion that the term “shall” as used in §§ 18.2-270.1, 18.2-271.1(C), and 46.2-391.01 plainly and unambiguously mandates that an ignition interlock system be installed in the situations described in the *Code*.

Furthermore, it is well established that statutes should not be read in isolation.⁶ Statutes relating to the same subject should be considered *in pari materia*.⁷ Moreover, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to legislative intent.⁸ Therefore, it is my opinion that the General Assembly intended that the ignition interlock requirements be imposed in every case involving a conviction for DUI, second or subsequent offense. The requirement may be imposed at the end of the three-year revocation period required for a second or subsequent offense conviction or as a condition of a restricted license authorized during the three-year license revocation period. It is clear that in enacting § 46.2-391.01, the General Assembly intended to require the DMV Commissioner to impose the ignition interlock system requirements mandated by §§ 18.2-270.1 and 18.2-271.1 when a court fails to order the system. When a court has not imposed the ignition interlock system requirements, the General Assembly not only has authorized the Commissioner to impose such requirements on an individual convicted for DUI, second or subsequent offense, it has mandated that the Commissioner do so.⁹

CONCLUSION

Accordingly, it is my opinion that the Commissioner of the Department of Motor Vehicles is both authorized and mandated to impose an ignition interlock system upon an individual seeking reinstatement of a driver’s license after the three-year license revocation period resulting from a conviction for driving under the influence, second or subsequent offense, when the convicting court fails to order the installation of such system.

¹You provide a set of factual circumstances specific to a particular person. To the extent that the issue of whether the Department acted appropriately in this particular situation is a question of fact, this Office does not investigate the facts behind opinion requests and does not issue opinions regarding questions of fact. See 2006 Op. Va. Att’y Gen. 141, 141. Further, Attorneys General defer to the interpretations of the agency charged with administering the law unless such interpretation clearly is wrong. See, e.g., 2007 Op. Va. Att’y Gen. 30, 34. I have, therefore, limited my analysis to a general review of the statutes related to the imposition of ignition interlock system requirements and the general authority of the Department related to such imposition.

²Section 18.2-266 generally prohibits persons from driving or operating motor vehicles while under the influence of alcohol or drugs.

³Section 46.2-341.28 is related to the operation of commercial vehicles while under the influence of alcohol.

⁴Section 18.2-270.1 provides, in pertinent part, other requirements that:

“[B.]The offender shall be enrolled in and supervised by an alcohol safety action program pursuant to

§ 18.2-271.1 and to conditions established by regulation under § 18.2-270.2 by the Commission [on VASAP] during the period for which the court has ordered installation of the ignition interlock system....

“[C.]The Department [of Motor Vehicles] shall issue to the offender for the installation period required by the court, a restricted license which shall appropriately set forth the restrictions required by the court under this subsection and any other restrictions imposed upon the offender’s driving privilege, and shall also set forth any exception granted by the court under subsection F.

“D. The offender shall be ordered to provide the appropriate ASAP program, within 30 days of the effective date of the order of court, proof of the installation of the ignition interlock system. The Program shall require the offender to have the system monitored and calibrated for proper operation at least every 30 days by an entity approved by the Commission under the provisions of § 18.2-270.2 and to demonstrate proof thereof. The offender shall pay the cost of leasing or buying and monitoring and maintaining the ignition interlock system. Absent good cause shown, the court may revoke the offender’s driving privilege for failing to (i) timely install such system or (ii) have the system properly monitored and calibrated.”

⁵See *Andrews v. Shepherd*, 201 Va. 412, 414, 111 S.E.2d 279, 281-82 (1959); see also 1994 Op. Va. Att’y Gen. 64, 68.

⁶2B Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 51:2 (West 7th ed. 2008); Op. Va. Att’y Gen.: 1999 at 22, 22; 1998 at 123, 124; *id.* at 19, 21; 1996 at 197, 198; 1995 at 146, 147; 1993 at 160, 162; *id.* at 135, 137; 1992 at 108, 112.

⁷See *Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); 1996 Op. Va. Att’y Gen. 134, 135. “*In pari materia*” is the Latin phrase meaning “[o]n the same subject; relating to the same matter.” *Black’s Law Dictionary* 862 (9th ed. 2009).

⁸See 2A Singer & Singer, *supra* note 6, at § 46:5 (West 7th ed. 2008); 2000 Op. Va. Att’y Gen. 182, 185.

⁹See Va. Code Ann. § 46.2-391.01 (2005) (providing that Commissioner “shall enforce” requirements relating to ignition interlock systems); see also *supra* note 5 and accompanying text.

OP. NO. 10-106

MOTOR VEHICLES: REGULATION OF TRAFFIC – EMERGENCY VEHICLES

Activation of sirens and lights not a requirement for immunity from criminal prosecution for persons responding to emergencies.

The Honorable Janet D. Howell
Member, Senate of Virginia
Chair, Virginia State Crime Commission
November 15, 2010

ISSUE PRESENTED

You inquire whether, to benefit from the exemption from criminal prosecution found in § 46.2-920(B), operators of emergency vehicles must engage both lights and sirens to qualify for the exemption.

RESPONSE

It is my opinion that the exemption from criminal prosecution found in § 46.2-920 does not require emergency vehicle operators to activate the vehicle’s lights or siren when doing so is not reasonably necessary.

APPLICABLE LAW AND DISCUSSION

Section 46.2-920 provides that “[t]he driver of any emergency vehicle, when such vehicle is being used in the performance of public services, and when such vehicle is operated under emergency conditions may, without subjecting himself to criminal prosecution” engage in certain specified conduct that would otherwise expose a driver to prosecution, including, for example, disregarding speed limits. The exemption applies

only when the operator of such vehicle displays a flashing, blinking, or alternating emergency light or lights . . . and sounds a siren, exhaust whistle, or air horn design to give automatically intermittent signals, as may be reasonably necessary, and only when there is in force and effect for such vehicle [insurance or a certificate of self-insurance.]^[1]

Statutes should be construed according to their plain language.² First, the statute provides that the exemption from prosecution applies only if the vehicle displays lights “and” a siren, exhaust whistle or air horn. Therefore, the first part of subsection B contemplates that the vehicle would activate both lights and siren to benefit from the exemption. The statute, however, does not end there, because it further provides the limiting phrase “as may be reasonably necessary.”

The key is whether the phrase “as may be reasonably necessary” modifies both the “lights” and the “siren” clause, or whether it modifies only the “siren” requirement. It is my conclusion that the phrase modifies both clauses. First, the clause “as may be reasonably necessary” is separated from the preceding clause by a comma, signaling that it is not incorporated into and, therefore, does not modify exclusively, the preceding “siren” clause. Second, this interpretation is consistent with the purpose of this statute, which is to shield from criminal prosecution persons who are providing a public service at great risk to themselves. The manifest purpose of the statute is not to second-guess a decision, made in high-stress conditions and in a wide range of circumstances, whether to activate the lights, or siren, or both. For example, an emergency vehicle driver may speed away to respond to an emergency, while speaking on the radio, and later turn on the emergency lights. Or the driver may conclude that emergency signals would be inappropriate because of the late hour and the absence of any traffic. Of course, in most circumstances, prudence dictates that either lights or a siren or both should be activated, but the statute does not make lights or sirens an absolute requirement for the exemption to apply. Rather, it affords discretion to persons responding to emergencies to determine whether sirens and lights are “reasonably necessary.”

CONCLUSION

Accordingly, it is my opinion that the exemption from criminal prosecution found in § 46.2-920 does not require as a condition for its application that emergency vehicle operators have either lights or a siren to be activated when doing so is not reasonably necessary.

¹ VA. CODE ANN. § 46.2-920(B) (2010).

² Signal Corp. v. Keane Federal Sys., 265 Va. 38, 46-47, 574 S.E.2d 253, 257 (2003).

OP. NO. 09-068

MOTOR VEHICLES: REGULATION OF TRAFFIC – GENERAL AND MISCELLANEOUS

No authority for Commonwealth's attorney to provide representation for toll facility operator in actions brought under § 46.2-819.1 or § 46.2-819.3 for unpaid tolls, administrative fees, and civil penalties.

THE HONORABLE JAMES E. PLOWMAN

LOUDOUN COUNTY COMMONWEALTH'S ATTORNEY

FEBRUARY 16, 2010

ISSUE PRESENTED

You ask whether a Commonwealth's attorney has the authority to represent a toll facility operator in actions brought against vehicle operators or registered owners pursuant to § 46.2-819.1 or § 46.2-819.3 for unpaid tolls, administrative fees, and civil penalties.

RESPONSE

It is my opinion that a Commonwealth's attorney has no authority to provide representation for a toll facility operator in actions brought under § 46.2-819.1 or § 46.2-819.3 for unpaid tolls, administrative fees, and civil penalties.

APPLICABLE LAW AND DISCUSSION

A Commonwealth's attorney is a constitutional officer whose duties are prescribed by law.¹ The primary responsibility of a Commonwealth's attorney is to enforce the criminal laws within his jurisdiction.² Specifically, a Commonwealth's attorney shall prosecute felonies and "may in his discretion, prosecute Class 1, 2, and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of \$500 or more, or both such confinement and fine."³ Commonwealth's attorneys also "may perform such other duties, not inconsistent with [the] office, as the governing body may request."⁴ In cities or counties of a certain population,⁵ Commonwealth's attorneys may not engage in the private practice of law.

Section 46.2-819 provides, in pertinent part, that "[e]xcept for those permitted free use of toll facilities under § 33.1-252, it shall be unlawful for the driver of a motor vehicle to use a toll facility without payment of the specified toll." In § 46.2-819.1(A), the General Assembly has authorized toll facility operators to install photo-monitoring systems to ensure that tolls are paid. Section 46.2-819.1(B) authorizes such operators to collect administrative fees to cover the expenses of collecting unpaid tolls. If a collection matter proceeds to court, the owner or operator of the vehicle is liable for an additional civil penalty.⁶ The civil penalty "shall not be deemed a conviction as an operator and shall not be made part of the driving record of the person upon whom such civil penalty is imposed."⁷

Section 46.2-819.3 contains many provisions similar to § 46.2-819.1, but applies to enforcement of tolls where there is no photo-monitoring or automatic vehicle

identification system, as described in § 46.2-819.1, or an actual stop by a law enforcement officer at the time of the offense, as covered under § 46.2-819.⁸ Violations of §§ 46.2-819.1 and 46.2-819.3 are traffic infractions that carry no possibility of jail time.⁹

First, you relate that the Dulles Greenway is a private entity. Generally, § 15.2-1628 prohibits Commonwealth's attorneys from engaging in the private practice of law. Second, where the General Assembly intends to permit or require that Commonwealth's attorneys provide representation for offenses that do not result in jail time or in civil matters, it knows how to express that intention.¹⁰ For example, § 46.2-1133(7), of the vehicle weight laws, provides that:

An alleged weight violation which is contested shall be tried as a civil case. *The attorney for the Commonwealth shall represent the interests of the Commonwealth.* The disposition of the case shall be recorded in an appropriate order, a copy of which shall be sent to the Department [of Motor Vehicles] in lieu of any record which may be otherwise required by § 46.2-383. If judgment is for the Commonwealth, payment shall be made to the Department. [Emphasis added.]^[11]

I find no similar provision in either § 46.2-819.1 or § 46.2-819.3; thus, the General Assembly has not expressed such an intention. Further, I find no other provision of law that authorizes such representation.

CONCLUSION

Accordingly, it is my opinion that a Commonwealth's attorney has no authority to provide representation for the toll facility operator in actions brought under § 46.2-819.1 or § 46.2-819.3 for unpaid tolls, administrative fees, and civil penalties.

¹ See VA. CONST. art. VII, § 4.

² VA. CODE ANN. §§ 15.2-528, 15.2-1626, 15.2-1627 (2008).

³ Section 15.2-1627(B).

⁴ Section 15.2-1626.

⁵ Section 15.2-1628 (2008).

⁶ See VA. CODE ANN. § 46.2-819.1(C) (Supp. 2009).

⁷ Section 46.2-819.1(J).

⁸ Since § 46.2-819.3 is similar § 46.2-819.1, I have not set out the pertinent portions of § 46.2-819.3 in this opinion.

⁹ See § 46.2-100 (Supp. 2009) (defining "traffic infraction" as "violation of law punishable as provided in § 46.2-113, which is neither a felony nor a misdemeanor"); § 46.2-113 (2008) (providing that violations of Title 46.2 "constitute traffic infractions" that "[u]nless otherwise stated" are "punishable by a fine of not more than that provided for a Class 4 misdemeanor").

¹⁰ See 2004 Op. Va. Att'y Gen. 68, 71 n.16 and opinions cited therein (noting that when General Assembly intends statute to impose requirements, it knows how to express its intention).

¹¹ See also, e.g., VA. CODE ANN. § 18.2-371.2(D) (2009) (authorizing Commonwealth's attorneys to recover civil penalty for violations of, among other things, prohibition on sale of tobacco to minors); VA. CODE ANN. § 32.1-36.1(B) (2009) (providing that Commonwealth's attorney may recover civil penalty for violation of confidentiality of tests to determine infection with human immunodeficiency virus); VA. CODE ANN.

§ 59.1-206(C) (Supp. 2009) (authorizing Commonwealth's attorneys to recover civil penalties for violations of Virginia Consumer Protection Act).

OP. NO. 10-033

MOTOR VEHICLES: REGULATION OF TRAFFIC – RECKLESS AND IMPROPER DRIVING

Section 46.2-856 prohibits passing or overtaking of two vehicles traveling 'abreast,' i.e. side by side, unless one of exceptions applies.

THE HONORABLE R. EDWARD HOUCK
MEMBER, SENATE OF VIRGINIA
MAY 20, 2010

ISSUE PRESENTED

You ask about the practical meaning of § 46.2-856, which prohibits passing or attempting to pass two other vehicles abreast, moving in the same direction.

RESPONSE

It is my opinion that § 46.2-856 prohibits the passing or overtaking of two vehicles traveling "abreast," *i.e.* side by side, unless one of the exceptions applies.

APPLICABLE LAW AND DISCUSSION

Section 46.2-856 provides, in pertinent part, that:

A person shall be guilty of reckless driving who passes or attempts to pass two other vehicles abreast, moving in the same direction, except on highways having separate roadways of three or more lanes for each direction of travel, or on designated one-way streets or highways.

Section 46.2-856 targets an especially dangerous type of passing. Danger always is present when one vehicle passes another by moving into a lane of travel used by oncoming traffic. There is an additional risk when passing two vehicles that are traveling abreast on highways with less than three lanes for travel in each direction. One of the two vehicles traveling abreast might move into the lane that the passing vehicle anticipates using after completing the passing maneuver. If this happens, the vehicle that is passing may be forced to remain in the lane used by oncoming traffic, thereby presenting a greater risk of a collision from oncoming traffic. It also is more difficult for the passing vehicle to track two vehicles traveling abreast than it is to monitor a single vehicle.

In my opinion, § 46.2-856 must be interpreted according to its plain language.¹ First, the statute prohibits "pass[ing]" or "attempt[ing] to pass." These terms have a readily understood meaning.² Second, the driver must pass or attempt to pass two vehicles that are "abreast."³ It is my opinion that the individual must be passing or attempting to pass

vehicles that are side by side in two different lanes as opposed to vehicles in single file in a single lane.⁴ Third, the vehicles that are being overtaken must be moving in the same direction.⁵

Section 46.2-856 does not apply in two situations. First, it does not apply when a highway has three or more lanes for each direction of travel. In that instance, there cannot be a reckless driving violation because the driver may safely pass the two vehicles that are “abreast” without entering into a lane of travel used by oncoming traffic. Second, § 46.2-856 does not apply when there are “designated one-way streets or highways,” presumably because there is no risk of the vehicle colliding with oncoming traffic.

CONCLUSION

Accordingly, it is my opinion that § 46.2-856 prohibits the passing or overtaking of two vehicles traveling “abreast,” *i.e.* side by side, unless one of the exceptions applies.

¹In interpreting statutes, one is “bound by the plain meaning of the words used, ‘unless a literal interpretation would result in a manifest absurdity.’” *Dowling v. Rowan*, 270 Va. 510, 519, 621 S.E.2d 397, 401 (2005) (quoting *Horne v. Dep’t of Mental Health*, 268 Va. 187, 192, 597 S.E.2d 202, 204 (2004)).

²The term “pass” means “to move past another vehicle going in the same direction: overtake.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1649 (1993) [hereinafter “WEBSTER’S”].

³VA. CODE ANN. § 46.2-856 (2005).

⁴The term “abreast” simply means “beside one another with bodies in line <four cars standing [abreast] so as to block the street>.” WEBSTER’S, *supra* note 2, at 5.

⁵*See* § 46.2-856.

OP. NO. 10-013

PENSIONS, BENEFITS, AND RETIREMENT: STATE POLICE OFFICERS’ RETIREMENT SYSTEM — VIRGINIA LAW OFFICERS’ RETIREMENT SYSTEM

Distinction in age for eligibility for annual allowance under Virginia Law Officers Retirement System and State Police Officers’ Retirement System does not constitute impermissible age discrimination.

THE HONORABLE FREDERICK M. QUAYLE
MEMBER, SENATE OF VIRGINIA
MARCH 17, 2010

ISSUE PRESENTED

You ask whether the distinction in eligibility under the Virginia Law Officers Retirement System and the State Police Officers’ Retirement System for an annual allowance constitutes age discrimination.

RESPONSE

It is my opinion that the distinction in age for eligibility for an annual allowance under the Virginia Law Officers Retirement System and the State Police Officers' Retirement System does not constitute impermissible age discrimination.

BACKGROUND

You note that the General Assembly has established two separate retirement systems for its law enforcement officers: (1) the State Police Officers' Retirement System¹ ("SPORS") and the Virginia Law Officers Retirement System² ("VaLORS"). You relate that retirees under VaLORS and SPORS receive an annual allowance, which is the same for both systems. You note, however, that there are differences in the ages for eligibility for these annual supplements. Thus, you state that SPORS retirees can receive more payments than VaLORS retirees because the retirement age under the Social Security Act occurs later than age sixty-five. Therefore, you inquire whether the different age requirements for eligibility results in age-related discrimination.

APPLICABLE LAW AND DISCUSSION

Retirees under VaLORS receive an annual allowance, initially in the amount of \$9,264, which is thereafter adjusted biennially by the Board of Trustees of the Virginia Retirement System.³ Retirees under SPORS receive the same amount.⁴ A VaLORS retiree, however, receives this annual supplement "from the date of his retirement until his sixty-fifth birthday."⁵ In contrast, a SPORS retiree receives the annual supplement "from the date of his retirement until his retirement age, as such term is defined under the Social Security Act."⁶ The Social Security Act provides several definitions of "retirement age." For example, for employees "who attain[] early retirement age^[8] after December 31, 2004, and before January 1, 2017,"⁹ the "retirement age" for purposes of the Social Security Act is "66 years of age" or older.

The federal Age Discrimination in Employment Act of 1967¹⁰ ("ADEA") prohibits an employer, including states, from discriminating on the basis of age.¹¹ The Congress of the United States specifically has exempted "an employee pension benefit plan" that "provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits" from the scope of ADEA.¹² Therefore, under the plain language of ADEA, there is no viable claim for age discrimination based on the differences in the annual supplements under SPORS and VaLORS.

CONCLUSION

Accordingly, it is my opinion that the distinction in age for eligibility for an annual allowance under the Virginia Law Officers Retirement System and the State Police Officers' Retirement System does not constitute impermissible age discrimination.

¹ See VA. CODE ANN. tit. 51.1, ch. 2, §§ 51.1-200 to 51.1-210 (2009).

² See tit. 51.1, ch. 2.1, §§ 51.1-211 to 51.1-221 (2009).

³ See § 51.1-217(B).

⁴ See § 51.1-206(B).

⁵Section 51.1-217(B).

⁶Section 51.1-206(B).

⁷See 42 U.S.C.S. § 416(l) (LexisNexis 1999) (defining “retirement age”).

⁸See *id.* § 416(l)(2) (defining “early retirement age”).

⁹*Id.* § 416(l)(1)(C).

¹⁰See 29 U.S.C.S. §§ 621 to 634 (LexisNexis 2002 & Supp. 2009).

¹¹See *id.* §§ 621(b), 623(a) (2002).

¹²See *id.* § 623(l)(1)(A)(i) (Supp. 2009).

OP. NO. 10-088

PENSIONS, BENEFITS, AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM – PARTICIPATION OF POLITICAL SUBDIVISIONS IN RETIREMENT SYSTEM

Former town attorney is ineligible to participate in VRS because he served as an independent contractor rather than as an employee.

BRADLEY C. RATLIFF, ESQUIRE
TOWN ATTORNEY, TOWN OF RICHLANDS
NOVEMBER 12, 2010

ISSUE PRESENTED

You inquire whether the former town attorney is eligible for benefits under the Virginia Retirement System.

RESPONSE

It is my opinion that because the former town attorney served as an independent contractor rather than as an employee, he is ineligible to participate in the Virginia Retirement System (“VRS”).

BACKGROUND

You relate that an esteemed attorney, who served the Town of Richlands for over thirty years under a contract with the Town, was not reappointed to the position at a recent town council meeting and that the town council would like to honor his service by including him in its VRS plan. The Town adopted the VRS plan in June 2010. You report that, pursuant to his contract with the town, this attorney received an annual “fee” or “salary” and corresponding 1099 tax forms, and that he accepted other clients. You note that the Town viewed him as an “officer.”

APPLICABLE LAW AND DISCUSSION

The Virginia Retirement Service is governed by §§ 51.1-100 through 51.1-168 of the *Code of Virginia*. Section 51.1-130 authorizes political subdivisions to permit their eligible employees to participate in the state system. Section 51.1-132 defines eligibility. It provides that eligible employees are those “[o]fficers and employees of the political

subdivision who are regularly employed full time on a salaried basis and whose tenure is not restricted as to temporary or provisional appointment”

Under the facts presented, the attorney was not an employee or officer of the Town. The fact that the Town was just one of the attorney’s clients, that the attorney served under a specific contract of employment, and that he received 1099 tax forms, signals that the attorney served as an independent contractor rather than as an employee or an officer. The eligibility statute does not include independent contractors. Therefore, although the ultimate determination of eligibility rests with VRS, I conclude that the former town attorney is not eligible to participate in the Virginia Retirement System.

CONCLUSION

Accordingly, it is my opinion that, because the former town attorney served as an independent contractor rather than as an employee, he is ineligible to participate in the Virginia Retirement System.

OP. NO. 10-100

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES – REGIONAL JAILS AND JAIL FARMS

Membership of a regional jail board is governed by statute; any contrary provisions of a local agreement must yield.

THE HONORABLE W.R. “RANDY” HAMILTON
SHERIFF, CITY OF BUENA VISTA
OCTOBER 22, 2010

ISSUES PRESENTED

You inquire concerning the composition of a board for a regional jail, noting that an agreement between several localities specifies the membership of this board, and you ask how the agreement can be reconciled with § 53.1-106, which mandates a minimum membership for such a board. You further ask, if § 53.1-106 requires the sheriff and at least one representative from each political subdivision to serve on the board of the regional jail, whether Rockbridge County can continue to appoint, in addition to the Sheriff, two members to serve on the Board.

RESPONSE

It is my opinion that the board membership specified in § 53.1-106 controls over the agreement and that Rockbridge County can continue to appoint two members to serve on the Board.

BACKGROUND

On March 1, 1986, Rockbridge County, the Cities of Lexington and Buena Vista, and the towns of Glasgow and Goshen reached an agreement to establish a regional jail. The agreement (“Agreement”) establishes a Board of Directors (“the Board”) and specifies

the composition of the Board. The Board comprises five members, appointed as follows: Rockbridge appoints two directors, Lexington and Buena Vista each appoints one, and Rockbridge appoints the final member of the Board, who must be a resident of Goshen or Glasgow. This final appointment alternates between residents of the two towns, and the town council of Goshen or Glasgow can make a nonbinding recommendation to Rockbridge County concerning this Board member.

APPLICABLE LAW AND DISCUSSION

Section 53.1-105 of the *Code of Virginia* authorizes any two or more political subdivisions to establish, maintain and operate a regional jail facility. Section 53.1-106(A) vests supervision and management of regional jails in a board or authority composed of representatives from each political subdivision. The board or authority must “consist of at least the sheriff from each participating political subdivision, and one representative from each political subdivision participating therein.”¹ The language of § 53.1-106(A) plainly requires that both a sheriff and one representative serve on the Board. A previous opinion from this office concludes that “the membership of a jail board or authority includes, at a minimum, the sheriff of each participating political subdivision and one member selected by the local governing body of each subdivision.”² Contrary provisions under the Agreement must yield.³ Therefore, at a minimum, the Board must consist of the Sheriffs of Rockbridge County, Lexington and Buena Vista,⁴ and one representative from each political subdivision appointed by the governing body of that subdivision.

Section 53.1-106(A) further provides that the membership of the Board must consist of “at least” the Sheriff and one member selected by the local governing body of each political subdivision that is a participating jurisdiction. Therefore, Rockbridge County can continue to appoint more than the minimum two representatives to the Board called for by § 53.1-106(A).⁵

CONCLUSION

Accordingly, it is my opinion that § 53.1-106 controls over the agreement, and that Rockbridge County can continue to appoint two members to serve on the Board.

¹ Before its amendment in 1998, § 53.1-106(A) required the appointment of the sheriff of a political subdivision to a jail authority only if the political subdivision appointed more than one representative to the authority. *See* 1998 Va. Acts. ch. 541, at 1289, 1289.

² 1998 Op. Va. Att’y Gen. 107, 108.

³ Because neither Goshen nor Glasgow has a sheriff, none need be appointed.

⁴ *Id.*

⁵ The statute fundamentally alters the nature of the composition of the Board contemplated by the Agreement. The participating localities are free, of course, to renegotiate the composition of the Board, provided it conforms to the minimum requirements imposed in § 53.1-106(A). Alternatively, the participating localities may seek special legislation permitting an alternative arrangement. *See* 1998 Op. Va. Att’y Gen. 107, 109 (noting that when a jail authority is created by special legislation, “the special legislation would control the composition of such membership.”).

OP. NO. 10-103**PROFESSIONS AND OCCUPATIONS: ATTORNEYS – SOLICITATION OF PROFESSIONAL EMPLOYMENT**

Proposed change to the Rules of Professional Conduct would permit conduct that would constitute “running and capping”.

MS. KAREN A. GOULD
EXECUTIVE DIRECTOR, VIRGINIA STATE BAR
DECEMBER 7, 2010

ISSUE PRESENTED

You inquire whether conduct appearing to be permissible under a proposed amendment (“amendment”) to Rule 7:2 of the Rules of Professional Conduct that would allow under certain circumstances a lawyer to refer clients to lawyers or non-lawyer professionals under a reciprocal referral agreement (“agreement”) would violate Virginia’s statutory prohibition on “running and capping.”

RESPONSE

It is my opinion that conduct permitted under the proposed amendment would violate the statute because the amendment would implicate both the person working for the lawyer under § 54.1-3939 and the lawyer if he engages in reciprocal referrals with another lawyer, which would make them both runners and cappers under § 54.1-3941.

BACKGROUND

You indicate the issue has arisen because the Virginia State Bar (“Bar”) is considering a proposed amendment to the Rules of Professional Conduct. The proposed amendment addresses Rule 7.2, which governs “Advertising” by lawyers. It would create an exception to the prohibition against a lawyer obtaining anything of value in return for another person referring the lawyer to a potential client under Rules 7.2(c) and 7.3(d).¹

APPLICABLE LAW AND DISCUSSION

Section 54.1-3941 provides: “It shall be unlawful for any person to act singly or in concert with others as a runner or capper for an attorney.” Section 54.1-3939 provides the following definitions:

ōAgent” means any person who acts for another with or without compensation at the request, or with the knowledge and acquiescence, of the other in dealing with third persons.

ōRunner” or *ōcapper*” means any person acting within the Commonwealth as an agent for an attorney in the solicitation of professional employment for the attorney.

ōSolicitation of professional employment” means obtaining or attempting to obtain, for an attorney, the opportunity to represent or

render other legal services to another person, for which services the attorney will or may receive compensation. Solicitation of professional employment shall not include conduct (i) limited to mere statements of opinion respecting the ability of an attorney, (ii) pursuant to a uniform legal aid or lawyer referral plan approved by the Virginia State Bar or (iii) pursuant to any qualified legal services plan or contract of legal services insurance.

The proposed amendment to Rule 7.2 states as follows:

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement

Applying the statutory definitions above, I conclude that the amendment would allow conduct that would constitute running and capping in violation of § 54.1-3941. The reciprocal agreement envisioned by the amendment, moreover, would make the attorney liable under § 54.1-3941 if the attorney acted "in concert" with another lawyer to obtain business for that other lawyer.²

A previous opinion of this office addressed running and capping in the context of the relationship between attorneys and real estate brokers.³ Specifically, the issue concerned instances where the broker included a lawyer's name on prepared contracts. This Office concluded that the arrangement constituted running and capping under then current statute. The language of the broker's contract implicated both the broker, who was obtaining clients for the attorney, and the attorney, who would be able to infer from the form of the contract that the broker was serving as his agent. The opinion noted that a broker would be liable under the statute even if he acted with a home purchaser's authority to select an attorney without the attorney's knowledge.

The instant facts are analogous. If the pre-printed contracts used by real estate brokers, which had attorneys' names on them, violated the prohibition on running and capping, the agreements described in the amendment would violate the statute because these agreements are designed expressly for the purpose (in part) of obtaining clients for lawyers.

An earlier version of the running and capping statute also has been addressed by the courts. The Supreme Court of Virginia denied the appeal of an injunction issued by the circuit court that found an arrangement in which a labor union was referring its members to union-approved lawyers violated the statute.⁴ On appeal, however, the United States Supreme Court reversed, finding that the statute unconstitutionally limited the union's

First Amendment rights, including helping union members prosecute their rights under federal statutes.⁵

On remand to the Virginia circuit court, the court entered another injunction forbidding “solicitation” but allowing the union to recommend attorneys.⁶ The Supreme Court of Virginia reversed, stating that the United States Supreme Court ruling did not permit that distinction.⁷ Under the Supreme Court of Virginia’s ruling, a lawyer may still be prohibited from soliciting, joining in or authorizing running and capping where the First Amendment concerns addressed by the United States Supreme Court are not present.⁸ There is no other controlling case law on the issue of Virginia’s running and capping prohibition.

The scenario that would be created by the amendment is distinguishable from the situation presented to the United States Supreme Court in *Brotherhood of Railroad Trainmen*, where a labor union had the First Amendment right to express its opinion about lawyers by recommending them to union members, in order to help those members protect their rights under federal law. That case did not involve the kind of express, reciprocal agreements envisioned in the proposed amendment, which would constitute the soliciting, joining in, or authorizing of running and capping that the Supreme Court of Virginia says still may be proscribed even after the U.S. Supreme Court decision.⁹

Comment 8 to the proposed amendment only reinforces my conclusion. That Comment shows that the proposed amendment would allow a lawyer to refer a client to a healthcare professional (for example) with the “expectation” that the professional would reciprocate by sending clients to the attorney for legal representation. This would make the healthcare professional an “agent” of the attorney for obtaining business.

CONCLUSION

Accordingly, it is my opinion that conduct authorized by the proposed amendment would violate Virginia’s “running and capping” prohibition.

¹ Rule 7.3(d) forbids a lawyer from compensating or giving “anything of value” to a person or organization for recommending, or securing employment for, a lawyer except as provided under Rules 7.1 and 7.2. The proposed amendment, by creating an exception to this prohibition in Rule 7.2, will make these reciprocal agreements permissible under Rule 7.3(d).

² Because someone can only violate § 54.1-3941 by running and capping “for an attorney,” a lawyer would only violate this statute if he or she worked to obtain business for another lawyer. A reciprocal agreement between a lawyer and a non-lawyer would only make the non-lawyer a runner and capper.

³ 1971-72 Op. Va. Att’y Gen. 19.

⁴ *Brotherhood of Railroad Trainmen v. Commonwealth ex rel. Virginia State Bar*, 203 Va. lxx (1962). *See Brotherhood of Railroad Trainmen v. Commonwealth ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E.2d 265 (1966).

⁵ *Brotherhood of Railroad Trainmen v. Commonwealth ex rel. Virginia State Bar*, 377 U.S. 1, 8 (1964).

⁶ *Commonwealth ex rel. Virginia State Bar v. Brotherhood of Railroad Trainmen*, 11 Va. Cir. 296 (1965).

⁷ 207 Va. at 190, 149 S.E.2d at 272, *cert. denied*, *Virginia ex rel. Virginia State Bar v. Bhd. of R.R. Trainmen*, 385 U.S. 1027 (1967).

⁸ *Id.* at 190-91.

⁹ 207 Va. at 190-91.

OP. NO. 10-094

**TAXATION: ENFORCEMENT, COLLECTIONS, REFUNDS, REMEDIES AND REVIEW OF LOCAL TAXES
– CORRECTION OF ASSESSMENTS, REMEDIES AND REFUNDS**

County attorney's consent is not a prerequisite for the county's issuance of a refund of excess taxes. To certify a correction of a local tax assessment, the commissioner of the revenue should provide written verification that he has determined that the assessment paid by the taxpayer was erroneous.

THE HONORABLE DEBORAH F. WILLIAMS
SPOTSYLVANIA COUNTY COMMISSIONER OF THE REVENUE
DECEMBER 22, 2010

ISSUES PRESENTED

You inquire regarding three issues relating to the issuance of refunds of local taxes to taxpayers who already have paid assessments that local tax officials later reduce through administrative procedures. Specifically, you ask what § 58.1-3981(A) requires a local commissioner of the revenue to tender to the board of supervisors in order to “certify” the commissioner’s determination that a local tax assessment was erroneous. You also seek guidance as to the role of a county attorney in providing his “consent” to the commissioner of the revenue’s determination, as required by that subsection. You further ask to what extent the commissioner of the revenue lawfully may provide an affected taxpayer’s local tax filings, with attached business and financial records to the county attorney. Finally, you ask whether a county attorney’s review of and consent to a downward adjustment of a local real estate tax assessment by the county’s board of equalization is a necessary predicate to the county’s issuance of a refund of excess taxes that a taxpayer initially paid.

RESPONSE

It is my opinion that a county commissioner of the revenue’s “certification” of a correction of a local tax assessment for purposes of § 58.1-3981(A) means that the commissioner should provide written verification that he has determined that the original local tax assessment paid by the affected taxpayer was erroneous. Further, it is my opinion that § 58.1-3(A)(2) authorizes a county commissioner of the revenue to supply to the attorney for his county any information that is necessary to enable the attorney to make an informed decision as to whether to consent to the commissioner of the revenue’s determination. Finally, I am of the opinion that a county attorney’s consent to a reduction of a real estate tax assessment by a county board of equalization is not a prerequisite to the county’s issuance of a refund of excess taxes.

BACKGROUND

You report that in situations where you have determined that a local tax assessment issued by your office was erroneous, the attorney for your county has requested information concerning the affected taxpayer's tax filings. This request has included any business or financial records attached to those filings. You also state that the county attorney has directed you to prepare a "certification" of an order issued by your county's board of equalization that will reduce the value of a real estate tax assessment, ostensibly to enable your county's officials to process and approve a refund of taxes resulting from the board of equalization's adjustment to the assessment.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3981 establishes the procedures a locality's officials and governing body must follow where the locality's commissioner of the revenue determines that a local tax assessment he previously issued is erroneous. Subsection (A) of that statute states, in relevant part:

If the commissioner of the revenue . . . is satisfied that he has erroneously assessed [a taxpayer who applies to the commissioner of the revenue for correction of a local tax assessment, pursuant to § 58.1-3980] with any such tax, he shall correct such assessment. If the assessment exceeds the proper amount, he shall exonerate the applicant from the payment of so much as is erroneously charged if not paid into the treasury of the county or city. If the assessment has been paid, the governing body of the county or city shall, *upon the certificate of the commissioner with the consent of the town, city or county attorney, or if none, the attorney for the Commonwealth, that such assessment was erroneous*, direct the treasurer of the county, city or town to refund the excess to the taxpayer.^[1]

Interpreting this statutory language, a circuit court concluded that a county board of supervisors lacks the statutory authority to correct local tax assessments made by the county's commissioner of the revenue, and, as a result, "a refund can only be authorized and directed to be paid by the [t]reasurer after the [c]ommissioner corrects the assessment and certifies the fact of the erroneous assessment to the governing body of the county."²

With regard to the General Assembly's intended meaning of the word "certificate" in § 58.1-3981(A), a prior opinion of the Attorney General construed the use of the term "certified" in § 58.1-3981(E) according to the ordinary meaning of the word "certify," which is "to authenticate or verify in writing."³ Because subsections (A) and (E) of § 58.1-3981 deal with essentially the same subject, *i.e.*, confirmation of the correction of a local tax assessment by a local commissioner of the revenue or equivalent assessing official, their uses of the terms "certificate" and "certified," respectively, should be construed *in pari materia*, so as to harmonize the general tenor of the statute as a whole.⁴ Applying this maxim to the court's interpretation of § 58.1-3981(A), I conclude that a

county commissioner of the revenue's "certificate" under that subsection entails his written verification to the board of supervisors that he has determined an assessment to be erroneous.

In addition to requiring a local commissioner of the revenue to certify that an assessment is erroneous, § 58.1-3981(A) further provides that the consent of the attorney for the locality is necessary before the governing body authorizes the local treasurer to refund the excess taxes. As a result, the Code imposes a duty on the attorney for a locality that is complementary to the duties of the locality's commissioner of the revenue and governing body. Section 58.1-3(A)(2) permits disclosure of otherwise confidential taxpayer information "in the line of duty under the law."⁵ The commissioner of the revenue, therefore, lawfully may disclose taxpayer information acquired in the performance of his tax-related duties to personnel of the locality who have a legal responsibility concerning the administration of local taxes. Prior opinions of the Attorney General indicate that a commissioner of the revenue may disclose taxpayer information to local officials charged with tax-related duties under the "line of duty" exception to § 58.1-3 to the extent that such information is "necessary for the performance of the officers' or employees' duties."⁶ Moreover, because § 58.1-3981(A) places upon the attorney for a locality a duty either to consent to or to disagree with a commissioner of the revenue's determination that a local tax assessment was erroneous, I conclude that a county commissioner of the revenue lawfully may provide the county attorney with such information as is necessary for the county attorney to make an informed decision whether or not to consent to the commissioner's determination.

In contrast to the two-step procedure outlined above, the statutory process for adjusting local real estate tax assessments by local boards of equalization does not require a second layer of approval by the county attorney. Instead, when a board of equalization determines that an assessment of the value of taxable real estate should be decreased, it has the duty to enter into the board's minutes an order giving effect to that determination.⁷ The board of equalization's order decreasing an assessment entitles the owner of the affected real estate to a refund of monies paid in excess of the reduced assessment and no further action by the commissioner of the revenue is necessary.⁸ Therefore, I conclude that a commissioner of the revenue has no power or duty to certify an adjustment to a real estate tax assessment ordered by the board of equalization, and consequently, there is no certification by the commissioner to which the attorney for the locality must consent before the treasurer may issue a refund of excess taxes paid by the affected taxpayer.

CONCLUSION

Accordingly, it is my opinion that a county commissioner of the revenue's "certification" of a correction of a local tax assessment for purposes of § 58.1-3981(A) entails the commissioner's written verification that he has determined that the original local tax assessment paid by the affected taxpayer was erroneous. Further, it is my opinion that §

58.1-3(A)(2) authorizes a county commissioner of the revenue to supply to the attorney for his county any information that is necessary to enable the attorney to make an informed decision as to whether to consent to the commissioner of the revenue's determination, pursuant to § 58.1-3981(A). Finally, I am of the opinion that a county attorney's consent to a reduction of a real estate tax assessment by a county board of equalization is not a prerequisite to the county's issuance of a refund of excess taxes.

¹ VA. CODE ANN. § 58.1-3981(A) (2009) (emphasis added).

² *ITT Teves Am. Automotive v. Bd. of Supvrs*, 45 Va. Cir. 39, 44 (Culpeper County 1997).

³ 2006 Op. Va. Att'y Gen. 200, 202 (citing *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970) and *BLACK'S LAW DICTIONARY* 241 (8th ed. 2004)).

⁴ *See Alston v. Commonwealth*, 274 Va. 759, 769, 652 S.E.2d 456, 462 (2007) (citing *Prillaman v. Commonwealth*, 199 Va. 401, 405–06, 100 S.E.2d 4, 7 (1957)).

⁵ *See* 2005 Op. Va. Att'y Gen. 147, 149 (citing 1999 Op. Va. Att'y Gen. 185, 186; 1974–1975 Op. Va. Att'y Gen. 523, 524).

⁶ *Id.* (citing 1999 Op. Va. Att'y Gen. 185, 186).

⁷ *See* §§ 58.1-3381 & -3384 (2009).

⁸ *See* § 58.1-3385 (2009) (“In case of a decrease in valuation, the order of the board shall entitle the taxpayer to an exoneration from so much of the assessment as exceeds the proper amount, if the taxes have not been paid by him and, in case the taxes have been paid, to a refund of so much thereof as is erroneous”).

OP. NO. 10-038

TAXATION: LICENSE TAXES

Only the business subject to BPOL taxes, and not its costumers, is liable for those taxes. Only motor vehicle dealers may recover BPOL taxes from their customers by way of a surcharge that is not also included in gross receipts.

THE HONORABLE CALVIN C. MASSIE, JR.

COMMISSIONER OF THE REVENUE, CAMPBELL COUNTY

AUGUST 24, 2010

ISSUES PRESENTED

You inquire regarding who may be liable for payment of local business, professional, and occupational license (“BPOL”) taxes and in which instances Virginia law permits businesses subject to BPOL taxation to invoice separately and charge their customers for the businesses’ BPOL taxes. Specifically, you ask whether motor vehicle dealers remain liable for payment of BPOL taxes when the dealer invoices BPOL taxes imposed on its sales separately from the base charges pursuant to § 58.1-3734, or whether the tax liability then attaches to customers. You further inquire whether § 58.1-3734 provides the sole legal basis upon which motor vehicle dealers may pass their BPOL tax on to consumers, and if not, whether a BPOL taxpayer other than a motor vehicle dealer, such as a telecommunications service provider, may demand payment from its customers of

charges that it separately invoices as “local gross receipts tax” or “local business license surcharge.”¹

RESPONSE

It is my opinion that liability for payment of BPOL taxes always lies with the persons engaged in businesses, professions, or occupations upon which localities levy such taxes, and not with their customers. It further is my opinion that only motor vehicle dealers may recover from their customers by way of a surcharge the BPOL taxes attributable to the gross receipts generated by sales to those customers without the surcharge also being included in the gross receipts and subjected to the BPOL tax.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3703(A) authorizes a local governing body to “levy and provide for the assessment and collection of county, city or town license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein with the county, city or town.” This tax has come to be known by the shorthand “BPOL.”

Section 58.1-3734 provides further, in relevant part, “whenever any locality imposes a license tax applicable to motor vehicle dealers measured by the gross receipts of such dealer, the dealer may separately state the amount of tax applicable to each sale of a motor vehicle and add such tax to the sales price of the motor vehicle.” In effect, this statute permits a motor vehicle dealer who is subject to BPOL taxation to recover from its customers the tax on the dealer’s gross receipts arising out of the sale of a motor vehicle. Notwithstanding this statutory authority, however, a motor vehicle dealer’s failure “to recover the tax from [its] purchaser shall not relieve such [dealer] from the obligation to pay the tax to the locality.”² This statutory provision plainly and unambiguously states the General Assembly’s intent that motor vehicle dealers subject to local BPOL ordinances will remain liable for the payment of taxes imposed on them by such ordinances, irrespective of whether the dealers successfully recover those taxes from their customers and, therefore, its literal terms must be given effect.³

Furthermore, even if § 58.1-3734 did not expressly state that the liability for payment of BPOL tax remains with the motor vehicle dealer, that liability could not shift to the customers because “‘statutes imposing taxes are to be construed most strongly against the government and are not to be extended beyond the clear import of the language used . . . and the official who seeks to enforce a tax must be able to put his finger on the statute which confers such authority.’”⁴ The sole authority that the General Assembly has afforded localities to levy license taxes appears in Chapter 37 of Title 58.1 of the Virginia Code.⁵ The provisions contained in that section clearly authorize localities to assess BPOL taxes on persons engaged in *businesses* subject to local licensure,⁶ but no statute permits localities to impose such taxes on *customers* of those licensed businesses. I therefore conclude that localities may enforce their BPOL tax ordinances only against persons engaged in businesses, professions, or occupations subject to licensure, and not against customers of such entities.

The only provision in Chapter 37 of Title 58.1 of the *Code* specifically authorizing a taxpayer to recover BPOL taxes attributable to its gross receipts from the source of those receipts, *i.e.*, the taxpayer's customer, appears in § 58.1-3734, dealing specifically with licensed motor vehicle dealers. "[W]hen a statute mentions specific items, an implication arises that items not present were not intended to be included within the scope of the statute."⁷ Therefore, it is my opinion that in the absence of an express statutory grant of authority like that contained in § 58.1-3734, businesses subject to BPOL taxation other than motor vehicle dealers may not pass through to their customers by way of a surcharge the tax attributable to the gross receipts of the business without the surcharge also being included in the gross receipts of the business and subjected to the BPOL tax.⁸

CONCLUSION

Accordingly, it is my opinion that liability for payment of BPOL taxes always lies with the persons engaged in businesses, professions, or occupations upon which localities levy such taxes, and not with their customers. It further is my opinion that, absent an express statutory authorization such as that applying to motor vehicle dealers, no business may pass through to its customers by way of a surcharge the BPOL taxes attributable to the gross receipts generated by sales to those customers without the surcharge also being included in the gross receipts of the business and subjected to the BPOL tax.

¹ You ask two additional, related questions concerning whether a motor vehicle dealer may refuse to consummate a sale of a motor vehicle to a customer who refuses to pay separately invoiced BPOL taxes, and assuming a telecommunications service provider may similarly pass on its BPOL taxes, whether a customer has any obligation to pay such charges, and if not, what legal rights and remedies the customer may assert to avoid or recover those charges. Pursuant to § 2.2-505(B), the Attorney General may render an official opinion requested by a commissioner of the revenue only where "the question dealt with is directly related to the discharge of the duties of the [commissioner]." Therefore, because questions concerning the rights and obligations of motor vehicle dealers and telecommunications service providers vis-à-vis their customers, and vice versa, deal with contractual matters between private parties, and not the official duties of commissioners of the revenue, I offer no opinion in response to those questions.

² VA. CODE ANN. § 58.1-3734(A) (2009).

³ "When a statute is clear and unambiguous, the rules of statutory construction dictate that the statute is interpreted according to its plain language;" *Virginia Polytechnic Inst. & State Univ. v. Interactive Return Serv., Inc.*, 271 Va. 304, 309, 626 S.E.2d 436, 438 (2006).

⁴ *City of Lynchburg v. English Constr. Co., Inc.*, 277 Va. 574, 583, 675 S.E.2d 197, 201 (2009) (quoting *Commonwealth v. Carter*, 198 Va. 141, 147, 92 S.E.2d 369, 373 (1956)).

⁵ Section 58.1-3702 (2009).

⁶ *Id. See, e.g.*, § 58.1-3703.1(A)(1) (2009).

⁷ *Wise County Bd. of Supvrs. v. Wilson*, 250 Va. 482, 485, 463 S.E.2d 650, 652 (1995) (citing *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992)). This canon of construction is known as "*expressio unius exclusion alterius*" – to express one is to exclude the other.

⁸ The term "gross receipts" for the purposes of license taxation "means the whole, entire, total receipts, without deduction." Section 58.1-3700.1 (2009). Consequently, expenses or costs incurred by a business subject to the BPOL tax generally are not deducted or excluded unless specifically authorized by law. *See* 2001 Op. Va. Att'y Gen. 179, 180 (carrier costs incurred by mobile telephone company are not deductible from gross receipts of company); 1990 Op. Va. Att'y Gen. 224, 225 (motor vehicle dealer may not deduct expenses for labor or materials used to recondition trade-in vehicle for resale when computing gross receipts). It follows, then, if a business recovers certain of its costs from a customer by way of a surcharge, that surcharge would be included in gross receipts for the purposes of license taxation unless expressly excluded by statute.

OP. NO. 10-053

TAXATION: MISCELLANEOUS TAXES – FOOD AND BEVERAGE TAX

Board of Supervisors has ultimate authority to set the rate of a meals tax once the imposition of such a tax has been approved by the citizens.

MICHAEL MCHALE COLLINS, ESQUIRE
ATTORNEY FOR BATH COUNTY, VIRGINIA
DECEMBER 27, 2010

ISSUE PRESENTED

You ask whether an ordinance passed by the Bath County Board of Supervisors pursuant to § 58.1-3833 is a legal enactment of a food and beverage tax (“meals tax”) in the amount of 1% when the citizens of Bath County by referendum authorized the Board of Supervisors to impose a meals tax in the amount of 4%.

RESPONSE

It is my opinion that the enactment by the Board of Supervisors of a meals tax ordinance with a rate of 1% after voters of that county gave their approval to a meals tax by a referendum vote is a valid exercise of the statutory authority granted to the Board of Supervisors to levy a meals tax in an amount and on such terms as that governing body may by ordinance prescribe.

BACKGROUND

You state that in the spring of 2009, the Board of Supervisors determined that the approval of the citizens of Bath County should be sought for the enactment of a meals tax in the county in order to provide another source of county revenue. The Board adopted a resolution to put the issue on the next general election ballot, and the Circuit Court entered an order directing that the ballot for the November 3, 2009, general election include a referendum on the following question:

Should Bath County enact an ordinance to levy a tax on food and beverages sold, for human consumption, by a restaurant, in the amount of 4% of the amount charged for such food and beverages not to include, however, sales through vending machines, by boarding houses, employee cafeterias, non-profit cafeterias, and other non-profit organizations?

You advise that the Board of Supervisors chose to present to the voters in the referendum question the maximum meals tax rate of 4% permitted by Virginia law so that the matter would be presented fairly to the public. The referendum question, however, described the proposed tax to be “in the amount of 4%” rather than using the language found in the enabling statute that the proposed tax was “not to exceed four percent.” The voters answered in the affirmative the question put before them, approving the enactment of a meals tax for Bath County in the referendum vote on November 3, 2009.

Following the passage of the referendum, those responsible for the collection of the tax voiced concern over the levying of a 4% meals tax in difficult economic times. The Board of Supervisors determined that imposing a tax in the amount of 1% could generate the targeted amount of revenue sought. Following a properly noticed public hearing, the Board of Supervisors enacted an ordinance levying a tax in the amount of 1%. A citizen complaint followed, challenging the authority of the Board of Supervisors to levy a meals tax at a rate less than the 4% rate stated in the approved referendum.

APPLICABLE LAW AND DISCUSSION

Two important principles of the Constitution of Virginia apply to this matter of local taxation. First, “all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed ... without their own consent, or that of their representatives duly elected.”¹ Second, “[n]o ordinance or resolution appropriating money ..., imposing taxes, or authorizing the borrowing of money shall be passed except by a recorded affirmative vote of a majority of all members elected to the governing body.”² The interplay between these two principles is displayed in § 58.1-3833, enacted by the General Assembly under its express constitutional authority to provide for the organization, government and powers of counties.³

Section 58.1-3833(A) authorizes any county “to levy a tax on food and beverages sold, for human consumption, by a restaurant.”⁴ This tax is “not to exceed four percent” and shall not be levied in certain circumstances enumerated in the statute, such as the sale of food and beverages from vending machines or by public and private schools, colleges and universities, hospitals and extended care facilities.⁵

A precondition to imposing the tax is that the voters approve the tax in a referendum held in accordance with § 24.2-684 and initiated either by a resolution of the county’s governing body or a petition signed by at least 10 percent of the registered voters of the county and presented to the circuit court.⁶ The role of the voters is not to determine the precise amount of the tax. Rather, the statute calls upon voters to “approve” the tax “in a referendum.”⁷ Following approval of the voters, the tax is to become effective “in an amount and on such terms as the governing body may by ordinance prescribe.”⁸

This division of responsibility mandated by the General Assembly in the context of the meals tax honors both constitutional principles mentioned above. The consent of the county’s citizens first must be obtained before a meals tax may be imposed, and the local governing body then retains the authority to adopt an ordinance setting the meals tax rate. Once the citizens of Bath County authorized a tax, the Board of Supervisors, by law, retained the discretion to set the tax rate consistent with statutory requirements. The language on the ballot could not fix the precise amount of the tax – that responsibility rested with the governing body.

Two complementary constitutional considerations favor this interpretation. First, the Board could not delegate its authority to determine the tax rates for the locality to its citizens. It is a general principle of law that a legislative body may not delegate or divest itself or its legislative powers or its discretion in exercising those powers.⁹ Second, and

more specifically, citizens cannot set a tax rate because the Virginia Constitution reserves that power to the governing body.¹⁰ The terms of the tax are thus within the discretion of the governing body.¹¹ Therefore, I conclude that the legislation authorizes the imposition of a tax up to 4% and requires the Board to set the rate following the affirmative vote of the referendum. Pursuant to this authority, the Board of Supervisors properly enacted an ordinance that implements a meals tax in the amount of 1%.¹² The safest practice, of course, and the one least likely to invite controversy, is to phrase the referendum language to state that the meal tax will be in an amount “up to 4%.”

CONCLUSION

Accordingly, it is my opinion that the enactment by the Board of Supervisors of a meals tax ordinance with a rate of 1% after voters of that county gave their approval to a meals tax by a referendum vote is a valid exercise of the statutory authority granted to the Board of Supervisors to levy a meals tax in an amount and on such terms as that governing body may by ordinance prescribe.

¹ VA. CONST. art. I, § 6.

² VA. CONST. art. VII, § 7.

³ VA. CONST. art. VII, § 2.

⁴ VA. CODE ANN. § 58.1-3833(A) (2009).

⁵ *Id.*

⁶ *Id.* The language on the ballot here satisfies the requirement found in § 24.2-684 that the circuit court order calling the referendum “shall state the question to appear on the ballot in plain English.”⁶ VA. CODE ANN. § 24.2-684 (2006). For the applicable definition of “plain English,” see § 24.2-687(A) (2006) (“‘Plain English’ means written in nontechnical, readily understandable language using words of common everyday usage and avoiding legal terms and phrases or other terms and words of art whose usage or special meaning primarily is limited to a particular field or profession”).

⁷ Section 58.1-3833(A).

⁸ *Id.*

⁹ 1985-86 Op. Va. Att’y Gen. 96, 96-97 (citing *Mumpower v. Hous. Auth.*, 176 Va. 426, 11 S.E.2d 732 (1940), *Beal v. City of Roanoke*, 90 Va. 77, 17 S.E. 738 (1893)).

¹⁰ *Wright v. Norfolk Elect. Bd.*, 223 Va. 149, 286 S.E.2d 227 (1982) (VA. CONST. art. VII, § 2 precludes residents of a city from setting the real estate tax rate through the initiative process).

¹¹ See 1997 Op. Va. Att’y Gen. 186, 188.

¹² I also note that a referendum will not be vitiated “if the spirit and intention of the law is not violated.” See 1977-78 Op. Va. Att’y Gen. 334, 336.

OP. NO. 10-057

TAXATION: REAL PROPERTY TAX – EXEMPTIONS FOR ELDERLY AND HANDICAPPED

Localities may not rely on a bright-line rule, totality-of-the-circumstances test or a federal guideline in determining who qualifies as “permanently disabled”. All criteria for eligibility must be set forth in the text of an ordinance.

THE HONORABLE FRANCIS X. O'LEARY
TREASURER, ARLINGTON COUNTY
AUGUST 9, 2010

ISSUES PRESENTED

You inquire whether a county can rely on a bright line income standard in determining whether an individual is “permanently and totally disabled” and, therefore, eligible for relief from the real estate tax, or whether the locality must consider the totality of the circumstances. You further inquire whether a federal disability standard constitutes a rational guide for determining whether a taxpayer is “unable to engage in substantial gainful activity” when that standard is employed without any reference to what may be “substantial” in any given locality. Finally, you ask whether the County may adopt a bright line legal standard that is not advertised to the public and is not published as part of the regulations governing the tax relief program.

RESPONSE

It is my opinion that localities may use neither a bright line test, a totality of the circumstances review, nor a federal disability guideline to determine whether a taxpayer is “permanently and totally disabled.” It further is my opinion that a locality may employ a federal disability guideline in determining the maximum income level for tax relief eligibility, and that considering such a guideline would not be irrational. Finally, it is my opinion that the criteria used by a locality must be set forth in the text of an ordinance.

BACKGROUND

You relate that the Arlington County Department of Human Services (“Department”), which administers the County’s elderly and disabled tax relief program, denied a homeowner’s application for real estate tax relief. The reason for denying the application was that the taxpayer reported more than \$11,600 in earned income for that year. You report that the Department based its decision on the federal guidelines for receiving disability benefits, which set the threshold for being engaged in “substantial gainful activity” at \$11,600 per year in income. You also note that this income criterion is not set forth in the County Code or published regulations. You state that the applicant, however, did comply with the eligibility requirements described on the county’s website and in other printed materials by providing the required documentation demonstrating his disability.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3210 of the *Code of Virginia* authorizes localities to “provide for the exemption from, deferral of, or a combination program of exemptions from and deferrals of taxation of real estate . . . owned by and occupied as the sole dwelling of anyone at least 65 years of age, or if provided in the ordinance, anyone found to be permanently and totally disabled.”¹ Although exemptions under § 58.1-3210 must be strictly construed,² the General Assembly has provided localities with some flexibility with respect to the scope of the exemptions.³ The Code imposes three considerations for tax relief: (1) age or disability; (2) income; and (3) net worth.⁴ Net worth is immaterial to your inquiry, so this opinion considers only the first two criteria.

First, as to disability, both the *Code of Virginia* and Arlington County define “[p]ermanently and totally disabled” as being “unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or deformity which can be expected to result in death or can be expected to last for the duration of such person’s life.”⁵ The Virginia Code does not define further what constitutes “substantial gainful activity.”

Section 58.1-3213(D) details three ways for a taxpayer to demonstrate permanent disability: 1) certification by the Social Security Administration, the Department of Veteran Affairs, or the Railroad Retirement Board; 2) Social Security Administration certification regarding eligibility for benefits pursuant to 42 U.S.C. § 423(d); or 3) sworn affidavits by two qualified medical doctors attesting that the applicant is “permanently and totally disabled.” Notably, no reference is made to a taxpayer’s financial circumstances. Although the County “shall also make any other reasonably necessary inquiry of persons seeking such exemption, . . . including qualification as permanently disabled,”⁶ the Code does not authorize a locality to impose any additional qualifications with respect to the disability determination.⁷ I therefore conclude that a locality may not rely on federal guidelines in determining an applicant’s disability status. Similarly, it is my opinion that local characteristics, such as median income and cost of living, are not to be considered when determining an applicant’s disability status.⁸

A second, distinct criterion for tax relief turns on the taxpayer’s income. The General Assembly has provided that a locality may choose between two options in determining the maximum income allowed to qualify for its tax relief program: 1) the greater of \$50,000 total combined income per year, or the income limits based upon family size for the respective metropolitan statistical area, as published by the United States Department of Housing and Urban Development, or 2) the locality’s median adjusted gross income of its married residents, as published by the University of Virginia.⁹

In spite of these income specifications, the General Assembly specifically has authorized certain localities, including Arlington County, to raise the income limit to \$75,000 per year.¹⁰ Furthermore, the General Assembly has authorized all localities to depart from the income levels specified in the Code if the locality wishes to provide lower income limits.¹¹ In adopting such income limits, localities can fashion a tax relief program that is adapted to their particular economic circumstances.

Although the federal disability standard is not a proper guideline for determining a taxpayer’s *disability*, it may serve as a basis for establishing *income* limitations on eligibility, should a locality adopt it as the income limit for eligibility. Were a locality to rely on this federal standard, such an income standard easily would survive “rational basis” scrutiny if challenged in court.¹²

Finally, although localities have discretion in fashioning aspects of a tax relief program, the criteria adopted by a locality must be specified in an ordinance. The Code provides that, “the governing body . . . may, *by ordinance*, provide for the exemption . . . upon such conditions and in such amount as *the ordinance* may prescribe;”¹³ and “the governing body . . . may *by ordinance* specify lower . . . figures.”¹⁴ Consequently, a

locality may not impose any qualifications or other conditions that are not included in the text of the ordinance.

CONCLUSION

Accordingly, it is my opinion that localities may not use a bright line test, a totality of the circumstances review, or a federal disability guideline in determining whether a taxpayer is “permanently and totally disabled.” It further is my opinion that a locality may employ a federal disability guideline in determining the income level for tax relief eligibility, and that considering such a guideline would not be irrational. Finally, it is my opinion that the criteria used by a locality must be set forth in the text of an ordinance.

¹ VA. CODE ANN. § 58.1-3210 (2009). Arlington County has adopted such an ordinance; ARLINGTON COUNTY, VA., CODE §§ 43-1 through 43-9 (2008).

² See VA. CONST. art. X, 6(f).

³ 1994 Op. Va. Att’y Gen. 117. For example, localities may exclude from total combined income any disability benefits up to \$5,000 and up to \$10,000 of all income for permanently disabled applicants; and in calculating financial worth, a locality may exclude the value of certain furnishings and may annually increase the limit by an amount equal to the previous year’s increase in the Consumer Price Index. VA. CODE ANN. § 58.1-3211 (2009).

⁴ Sections 58.1-3210; 58.1-3211.

⁵ Section 58.1-3217 (2009); ARLINGTON COUNTY, VA., CODE § 43-1 (2008).

⁶ VA. CODE ANN. § 58.1-3213(F) (2009).

⁷ The Dillon Rule “provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.” *Marble Techs., Inc., v. City of Hampton*, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010) (citation omitted).

⁸ As noted below, however, local conditions can be considered in determining whether a homeowner bears “an extraordinary tax burden on the real estate in relation to [his] income and financial worth.” Section 58.1-3218 (2009).

⁹ Section 58.1-3211(1)(a).

¹⁰ Compare §§ 58.1-3211(2) and 58.1-3211(3) with 58.1-3211(4).

¹¹ Section 58.1-3212 (2009).

¹² See, e.g., *Fed. Comm’n v. Beach Comm’n, Inc.*, 508 U.S. 307, 313 (1993) (noting highly deferential standard for court review of legislative classifications that do not implicate suspect classes or fundamental rights).

¹³ Section 58.1-3210(A) (emphasis added).

¹⁴ Section 58.1-3212 (emphasis added).

OP. NO. 10-062

TAXATION: REAL PROPERTY TAX – EXEMPTIONS FOR ELDERLY AND HANDICAPPED

Applicants must include their spouse’s net worth in calculating net combined financial worth, irrespective of the parties’ separation.

THE HONORABLE ROBERT S. WERTZ, JR.
COMMISSIONER OF THE REVENUE FOR LOUDOUN COUNTY
NOVEMBER 5, 2010

ISSUE PRESENTED

You ask a whether a married person, applying for a real property tax exemption authorized by § 58.1-3210, must include his or her spouse's net worth when calculating net combined financial worth to satisfy the condition set forth in § 58.1-3211(2) if the spouse's name does not appear on the deed to property and such spouse either has separated from or abandoned the applicant.

RESPONSE

It is my opinion that a married person applying for a real property tax exemption authorized by § 58.1-3210 must report both the applicant's net worth and his or her spouse's net worth to determine net combined financial worth as required by § 58.1-3211(2) irrespective of whether such spouse has separated from or abandoned the applicant or whether the spouse's name appears on the deed.

BACKGROUND

You state that a number of your constituents apply for real property tax exemptions under a tax relief program offered by Loudoun County pursuant to § 58.1-3210. You further state that some applicants object to the inclusion of their spouse's financial information in determining net worth when a spouse either has separated from or abandoned the applicant. In some cases of separation or abandonment, the applicants are unable to account for the whereabouts or financial information of their spouses. You further state that some of the parties have separation agreements granting ownership of the property at issue to the spouse applying for the tax exemption. In other cases, the non-applying spouse never was listed on the deed to the property.

APPLICABLE LAW AND DISCUSSION

Article X, § 6(b) of the *Constitution of Virginia* authorizes the General Assembly to enact laws permitting local governing bodies to provide an exemption for

local property taxation, or a portion thereof, within such restrictions and upon such conditions as may be prescribed, of real estate and personal property designed for continuous habitation owned by, and occupied as the sole dwelling of, persons not less than sixty-five years of age or persons permanently and totally disabled as established by general law who are deemed by the General Assembly to be bearing an extraordinary tax burden on said property in relation to their income and financial worth.^[1]

Pursuant to this authority, the General Assembly enacted § 58.1-3210, which authorizes localities to implement tax-relief programs for those persons who are at least sixty-five years of age or who are permanently and totally disabled.² Such exemptions, however, are not without limitation. Section 58.1-3211 imposes certain restrictions, providing, in

pertinent part, that “[t]he net combined financial worth, including the present value of all equitable interests...of the owners, and of the spouse of any owner...shall not exceed \$200,000.”³ Thus, persons seeking an exemption must submit an affidavit or other written statement accounting for the total combined net worth, including that of his or her spouse.⁴

Where, as here, the language of a statute is unambiguous, its plain meaning is to be applied.⁵ An ambiguity exists “when the language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness.”⁶ Additionally, real estate tax exemptions must be strictly construed against the applicant seeking the exemption.⁷

Section 58.1-3211(2) clearly indicates that an applicant’s “net combined financial worth” includes the “value of all equitable interests . . . of the owners, *and of the spouse of any owner.*” The statute does not require that the spouse of an owner also be an owner or be named on the deed or that the spouses live together. Unlike the income restrictions of § 58.1-3211(1), which considers the income of those persons residing in the dwelling, § 58.1-3211(2) makes no mention of living arrangements. Rather, applicants are required to report the net combined financial worth “of the owners, and of *the spouse of any owner.*”⁸

Therefore, when a married person seeks to qualify for a tax exemption authorized by § 58.1-3210, so long as the couple remains legally married and notwithstanding legal title to the home and/or a separation of the spouses, the spousal relationship remains, and the finances of the applicant’s spouse must be included in the calculation to determine net combined financial worth under the statute.

CONCLUSION

Accordingly, it is my opinion that a married person applying for a real property tax exemption authorized by § 58.1-3210 must report both the applicant’s net worth and his or her spouse’s net worth to determine net combined financial worth as required by § 58.1-3211(2) irrespective of whether such spouse has separated from or abandoned the applicant or whether the spouse’s name appears on the deed.

¹ VA. CONST. art. X, § 6(b). I note that Virginia voters will consider a ballot question on November 2, 2010, regarding whether this constitutional provision should be amended. If adopted, this amendment would strike the current limitation for this tax exemption to qualifying persons who bear “an extraordinary tax burden” and authorize the General Assembly to permit local governing bodies to determine their own income and/or financial worth limitations for such tax exemptions.

² VA. CODE ANN. § 58.1-3210(A) (2009).

³ Section 58.1-3211(2) (2009). It should also be noted that Loudoun County is permitted to raise the net combined financial worth limit to a maximum of \$540,000. Section 58.1-3211(4) (2009).

⁴ Section 58.1-3213(A) (2009).

⁵ See *Commonwealth v. Gregory*, 193 Va. 721, 726, 71 S.E.2d 80, 83 (1952) (“where a statute is simple and plain and no ambiguity exists courts are bound to follow the law as written.”).

⁶ *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985) (citing *Ayres v. Harleysville Mut. Cas. Co.*, 172 Va. 383, 393, 2 S.E.2d 303, 307 (1939)).

⁷ VA. CONST. art.X, § 6(f). See *DKM Richmond Assoc., L.P. v. City of Richmond*, 249 Va. 401, 407, 457 S.E.2d 76, 80 (1995) (“the general policy is to tax all property . . . the taxpayer has the burden to establish that it comes within the terms of the exemption”); *Westminster-Canterbury of Hampton Roads, Inc. v. City of Virginia Beach*, 238 Va. 493, 501, 385 S.E.2d 561, 565 (1989) (“exemption from taxation is the exception, and where there is any doubt, the doubt is resolved against the one claiming exemption”). See also 2007 Op. Va. Att’y Gen. 129, 131; 1994 Op. Va. Att’y Gen. 117, 119; 1998 Op. Va. Att’y Gen. 127, 127 (exemptions under § 58.1-3210 must be strictly construed).

⁸ Section 58.1-3211(2) (italics added).

OP. NO. 10-107

TAXATION: REAL PROPERTY TAX – EXEMPTIONS FOR ELDERLY AND HANDICAPPED

Individual who is employed full-time and earns a substantial salary is ineligible for tax relief.

STEPHEN A. MACISAAC, ESQUIRE
COUNTY ATTORNEY, ARLINGTON COUNTY
OCTOBER 22, 2010

ISSUES PRESENTED

You inquire whether an applicant for tax relief under § 58.1-3210, who has obtained a signed statement from a doctor stating that the applicant is permanently incapacitated, yet who has been a full-time employee of a governmental agency for over a decade, where he currently earns an annual salary of \$44,000, is engaged in “any substantial gainful activity.”

RESPONSE

It is my opinion that, under the plain language of § 58.1-3210, an individual who is employed full-time and who continues to earn a substantial salary is engaged in “substantial gainful activity” and is, therefore, ineligible for tax relief under § 58.1-3210.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3210 of the *Code of Virginia* authorizes localities to “provide for the exemption from, deferral of, or a combination program of exemptions from and deferrals of taxation of real estate . . . owned by and occupied as the sole dwelling of anyone at least 65 years of age, or if provided in the ordinance, anyone found to be permanently and totally disabled.”¹ Although exemptions under § 58.1-3210 must be strictly construed,² the General Assembly has provided localities with some flexibility “in determining the scope of the exemptions.”³ The Code imposes three considerations for tax relief: (1) age or disability; (2) income; and (3) net worth.⁴ Your inquiry focuses on the disability requirement.

First, as to disability, both the *Code of Virginia* and Arlington County define “[p]ermanently and totally disabled” as being “unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or deformity which can be expected to result in death or can be expected to last for the

duration of such person's life."⁵ The Virginia Code does not define further what constitutes "substantial gainful activity."

Section 58.1-3213(D) details three ways for a taxpayer to demonstrate permanent disability: 1) certification by the Social Security Administration, the Department of Veteran Affairs, or the Railroad Retirement Board; 2) Social Security Administration certification regarding eligibility for benefits pursuant to 42 U.S.C. § 423(d); or 3) sworn affidavits by two qualified medical doctors attesting that the applicant is "permanently and totally disabled."

A taxpayer who obtains this documentation establishes a *prima facie* case of a disability. That, however, does not end the inquiry. The statute further provides that the County "shall also make any other reasonably necessary inquiry of persons seeking such exemption, . . . including qualification as permanently disabled."⁶ Merely obtaining an affidavit from a physician, or using one of the other methods under the statute to demonstrate disability, does not conclusively establish disability. When a locality is aware of evidence that contradicts the applicant's claimed disability, the locality can investigate and reach its own determination of whether the individual truly is "unable to engage in any substantial gainful activity." A person's track record in substantial gainful activity, as manifested by a continuous record of past and present employment at a respectable salary, constitutes compelling circumstantial evidence that this individual can, in fact, "engage in substantial gainful activity."⁷

CONCLUSION

Accordingly, it is my opinion that, under the plain language of § 58.1-3210, an individual who is employed full-time and who continues to earn a substantial salary is engaged in "substantial gainful activity" and is, therefore, ineligible for tax relief under § 58.1-3210.

¹ VA. CODE ANN. § 58.1-3210 (2009). Arlington County has adopted such an ordinance; ARLINGTON COUNTY, VA., CODE §§ 43-1 through 43-9 (2008).

² See VA. CONST. art. X, § 6(f).

³ 1994 Op. Va. Att'y Gen. 117, 120. For example, localities may exclude from total combined income any disability benefits up to \$5,000 and up to \$10,000 of all income for permanently disabled applicants; and in calculating financial worth, a locality may exclude the value of certain furnishings and may annually increase the limit by an amount equal to the previous year's increase in the Consumer Price Index. VA. CODE ANN. § 58.1-3211 (2009).

⁴ Sections 58.1-3210; 58.1-3211.

⁵ Section 58.1-3217 (2009); ARLINGTON COUNTY, VA., CODE § 43-1 (2008).

⁶ Section 58.1-3213(F) (2009).

⁷ A prior opinion of this office concluded that an income standard found in a federal statute is not a proper guideline for determining a taxpayer's disability status. 2010 Op. Va. Att'y Gen. 10-057. You indicate that the County consults the SSA wage index as one of several criteria for determining whether an individual is permanently and totally disabled. You further note that this standard is not used in lieu of the income and net worth requirements of § 58.1-3211. In my view, a taxpayer may earn less than this federal standard and be ineligible for tax relief under § 58.1-3210, or may earn more and remain eligible, depending on the specific facts at hand. The County may consult a federal or other standard, for example as a "tripwire" to launch an investigation of a claimed disability, so long as the borrowed standard does not become a substitute for the fact-specific determination contemplated by § 58.1-3217: whether a particular individual is "unable to engage in any

substantial gainful activity by reason of any medically determinable physical or mental impairment or deformity which can be expected to result in death or can be expected to last for the duration of such person's life."

OP. NO. 10-006

TAXATION: REAL PROPERTY TAX – REASSESSMENT/ASSESSMENT (VALUATION) PROCEDURE AND PRACTICE

Clay and sand are minerals that are subject to local taxation whether or not property is under development; initial discovery of mineral generally is time at which assessment would occur. Income capitalization methodology would comply with requirements for determining fair market value of mineral lands.

THE HONORABLE SAMUEL W. SWANSON, JR.
PITTSYLVANIA COUNTY COMMISSIONER OF THE REVENUE
APRIL 26, 2010

ISSUE PRESENTED

You ask whether certain deposits of clay and sand are subject to assessment as subsurface minerals for purposes of local real property taxes. If so, you ask at what point in time the assessment of such clay and sand would be appropriate. Finally, you ask whether the capitalized income strength method of valuation for assessing subsurface minerals is appropriate under §§ 58.1-3286 and 58.1-3287.

RESPONSE

It is my opinion that clay and sand that are in place, *i.e.*, beneath the surface of real property, are minerals that are subject to local taxation whether or not the property is under development. It further is my opinion that the initial discovery of a mineral generally is the time at which assessment would occur. Finally, it is my opinion that the income capitalization methodology that you describe would comply with §§ 58.1-3286 and 58.1-3287.

BACKGROUND

You indicate that a brick company intends to extract clay deposits from a 1,200-acre tract of land in Pittsylvania County that the company recently purchased. You state that at the present time no mining activity has occurred. You also indicate that the owner of certain land has been dredging sand from the bed of a river located on his property. Further, you relate that the Virginia Department of Mines, Minerals, and Energy has identified this landowner as being engaged in production.

You state that you use a capitalization rate obtained from the contractor that performs Pittsylvania County's reassessments to ascertain the present value of undeveloped minerals based on projected future earnings. You indicate that you adjust this capitalization rate only in the year in which the county reassessment becomes final; however, you assess undeveloped minerals annually using the prevailing capitalization

rate and year-to-year variances in the tonnage of materials reported to the Department of Mines as having been extracted.

APPLICABLE LAW AND DISCUSSION

Pursuant to Article X, § 4 of the Constitution of Virginia and § 58.1-3000,¹ localities in Virginia have the authority to tax real estate, coal, and other mineral lands.¹ Therefore, whether a locality may impose real estate taxes on deposits of clay and sand depends on whether these substances constitute “minerals.”

A 1977 opinion of the Attorney General (“1977 Opinion”) has analyzed a similar question regarding a tract of land utilized as a stone quarry.² The 1977 Opinion concluded that stone constitutes a mineral subject to local assessment.³ Further, the 1977 Opinion concluded that when the General Assembly enacted § 58-744, it contemplated the definition of the term “mineral” that the Supreme Court of Virginia tacitly approved.⁴ In interpreting the term, the Virginia Supreme Court noted that “[t]he word “mineral,” in the popular sense, means those inorganic constituents of the earth’s crust which are commonly obtained by mining or other process for bringing them to the surface for profit.”⁵ Therefore, stone is a mineral when it is extracted from land for profit.⁶

Based on this reasoning, clay and sand deposits would also be “minerals” subject to local real property tax assessment.⁷ It is clear that the clay and sand at issue will be extracted for commercial purposes. Although Title 58.1 does not define the term “mineral,” Title 45.1, which governs mines and mining in the Commonwealth, contains several definitions of “mineral.”⁸ I note that § 45.1-161.8 specifically includes clay and sand in the definition of “mineral.”⁹ Therefore, it is my opinion that clay and sand constitute “minerals” and are subject to local assessment.

You next ask at what point clay, sand, and other minerals become subject to assessment. Article X, § 4 of the Virginia Constitution requires taxable real estate, including mineral lands, to be “assessed for local taxation in such manner and at such times as the General Assembly may prescribe by general law.”¹⁰ Sections 58.1-3286 and 58.1-3287 contain the requirements for assessing mineral lands.¹⁰ Section 58.1-3287 mandates that in any year when a locality conducts a general reassessment of real estate, the assessor must assess the fair market value of mineral lands and minerals separately from other real estate. Such assessment must be done in accordance with § 58.1-3286, which requires assessments of mineral lands to be based upon:

1. The area and the fair market value of such portion of each tract as is improved and under development;
2. The fair market value of the improvements upon each tract; and
3. The area and fair market value of such portion of each tract not under development.

In each of the years between general reassessments, § 58.1-3287 requires commissioners of the revenue (“commissioners”) to “adjust [these] assessed values in such manner as to reflect such changes as may have occurred during the preceding year, especially such changes as may have operated to increase or decrease” any of the values.

One type of change that has been recognized as potentially operating to increase or decrease the value of a parcel of real estate, within the meaning of § 58.1-3287, is the initial discovery of minerals thereon.¹¹ Thus, minerals should be separately and specially assessed upon their discovery, whether that occurs in the course of a general reassessment of real estate or in the years between general reassessments.¹² Furthermore, I note that § 58.1-3286 specifically requires commissioners to determine the “fair market value of such portion of each tract not under development.” The fact that no mining operations have occurred does not shield the minerals underlying a parcel from assessment.

Finally, you ask whether the income capitalization method that you employ to assess the value of such minerals complies with §§ 58.1-3286 and 58.1-3287. Section 58.1-3286 requires that commissioners assess mineral lands at their fair market value and to record such mineral assessments separately from the assessed fair market value of the land overlying the minerals. The only additional mandate on such assessments imposed by § 58.1-3287 is the directive that commissioners adjust the values of minerals included in general reassessments based on “such changes as may have occurred during the preceding year.”

The Virginia Supreme Court has “defined the fair market value of a property as its sale price when offered for sale ‘by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it.’”¹³ I note that there are three generally accepted approaches for ascertaining the fair market value of real property: “the cost method, the market method, and the income capitalization method.”¹⁴ The income capitalization approach to valuation is recognized as a useful method of ascertaining the fair market value of income-producing property such as mineral rights.¹⁵ Under this approach, the property’s fair market value derives from an estimate of the cash flows that the property will generate, to which a multiplier (“capitalization rate”), which is based on the average rate of return of investment from similar properties, is applied to arrive at the present capital value of the property.¹⁶ In my opinion, reliance upon the tonnage of extracted minerals reported to the Department of Mines, Minerals and Energy is a reasonable means of estimating the income that would accrue to an owner in mineral land inasmuch as the depletion of minerals beneath the land’s surface would diminish the amount of material that the owner would be able to offer for sale.

Sections 58.1-3286 and 58.1-3287 do not prescribe which valuation methodology a commissioner must employ to ascertain the fair market value of mineral lands. Similarly, I find no law that specifically requires a commissioner who employs an income capitalization approach to adjust the capitalization rate on an annual basis. Since §§ 58.1-3286 and 58.1-3287 do not mandate a specific methodology by which a commissioner is to ascertain such fair market value, it is my opinion that the method for determination is within his discretionary authority.¹⁷ Of course, any method a commissioner uses must be reasonable.¹⁸ I note, however, that the accuracy of a capitalization rate, related to calculation of the time value of money versus the compensation factor for the risk associated with a venture, contains an element of subjectivity.¹⁹ Therefore, a party aggrieved by an assessment derived from a static capitalization rate may be able to present facts that would undermine the validity of the

prevailing rate based on changes in conditions that occur in years between general reassessments.²⁰

CONCLUSION

Accordingly, it is my opinion that clay and sand that are in place, *i.e.*, beneath the surface of real property, are minerals that are subject to local taxation whether or not the property is under development. It further is my opinion that the initial discovery of a mineral generally is the time at which assessment would occur. Finally, it is my opinion that the income capitalization methodology that you describe would comply with §§ 58.1-3286 and 58.1-3287.

¹ See 1993 Op. Va. Att’y Gen. 221, 224, *cited in* 2007 Op. Va. Att’y Gen. 138, 140 n.1.

² See 1976–77 Op. Va. Att’y Gen. 267, 267.

³ *Id.* at 268 (interpreting § 58-744, predecessor to § 58.1-3286).

⁴ *Id.* at 267-68.

⁵ *Warren v. Clinchfield Coal Corp.*, 166 Va. 524, 528, 186 S.E.2d 20, 22 (1936) (citation omitted).

⁶ See 1976–77 Op. Va. Att’y Gen., *supra* note 2, at 268.

⁷ You also inquire whether sand that is dredged from a riverbed is subject to assessment pursuant to §§ 58.1-3286 and 58.1-3287 to the same degree as minerals that are “mined” in the traditional sense. I note that neither of these statutes expressly or impliedly draws a distinction regarding the method for mining or extraction of minerals. Furthermore, since the General Assembly intended that these statutes require the assessment of “minerals,” as defined by the *Warren* court, then it is clear that the assessment of minerals is not limited to a particular means of extraction or mining. See *supra* notes 4-5 and accompanying text. The *Warren* court endorsed a definition of “minerals” that included “inorganic constituents of the earth’s crust which are commonly obtained by mining or other process.” *Warren*, 166 Va. at 528, 186 S.E.2d at 22 (emphasis added) (citation omitted). Therefore, in my opinion, the sand deposits that you describe are subject to assessment.

⁸ See *Branch v. Commonwealth*, 14 Va. App. 836, 839, 419 S.E.2d 422, 425 (1992) (noting that because *Code* is one body of law, sections using same phraseology may be consulted to determine meaning of statute).

⁹ I also note that § 45.1-229 defines the term “other minerals” with the same language used by § 45.1-161.8 to define the term “mineral.” See also VA. CODE ANN. § 45.1-161.292:2 (2002) (defining “mineral” with same language as § 45.1-161.8); § 45.1-180 (2002) (defining “mineral,” related to requirement for permit for mining operations other than drilling or mining of coal, as “[o]re, rock, and any other solid homogenous crystalline chemical element of compound that results from the inorganic processes of nature other than coal”).

¹⁰ See 1992 Op. Va. Att’y Gen. 178, 180.

¹¹ *Id.*

¹² See *id.* at 181 n.1.

¹³ *Keswick Club, L.P. v. County of Albemarle*, 273 Va. 128, 136, 639 S.E.2d 243, 247 (2007) (quoting *Tuckahoe Woman’s Club v. City of Richmond*, 199 Va. 734, 737, 101 S.E.2d 571, 574 (1958)).

¹⁴ Stephen C. Gara & Craig J. Langstraat, *Property Valuation for Transfer Taxes: Art, Science, or Arbitrary Decision?*, 12 AKRON TAX J. 125, 143 (1996); see also *Keswick Club*, 273 Va. at 137, 639 S.E.2d at 248 (recognizing “the cost approach, income approach, and sales approach”).

¹⁵ Gara & Langstraat, *supra* note 14, at 143.

¹⁶ See 4 POWELL ON REAL PROPERTY § 34A.06 (Michael Allan Wolf, ed., Matthew Bender & Co., Inc., 2009) [hereinafter POWELL]; Gara & Langstraat, *supra* note 14, at 143.

¹⁷ See *Va. Beach v. Hay*, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999) (holding that when legislature grants power to local government, but does not specify method of implementing power, local government’s choice regarding implementation of conferred power will be upheld, provided method chosen is reasonable); see also 2005 Op. Va. Att’y Gen. 147, 148 and opinions cited therein (noting that act did not specify method for

compliance, but left to discretion of agency; noting also that commissioners, as constitutional officers, are vested with authority and power to administer operations of their offices in manner and to extent they see fit).

¹⁸ *Hay*, 258 Va. at 221, 518 S.E.2d at 316.

¹⁹ See 1 POWELL, *supra* note 16, at § 10B.06.

²⁰ See VA. CODE ANN. § 58.1-3350 (2009) (providing that any person aggrieved by any assessment may apply for relief to board of assessors or to board of equalization or may apply for relief to appropriate circuit court for correction).

OP. NO. 10-003

TAXATION: REAL PROPERTY TAX – REASSESSMENT/ASSESSMENT (VALUATION) PROCEDURE AND PRACTICE

General Assembly has not authorized city to conduct more than one general reassessment of real property in any one year. Taxpayer may be required to pay higher corrected assessment in some limited circumstances.

THE HONORABLE M. KIRKLAND COX
MEMBER, HOUSE OF DELEGATES
MARCH 17, 2010

ISSUE PRESENTED

You ask whether a city that assesses real property on a twelve-month basis has the authority to reassess such real property before the twelve-month period has expired and to change the assessed value of a piece of property.

RESPONSE

It is my opinion that the General Assembly has not authorized a city to conduct more than one general reassessment of real property in any one year. A taxpayer, however, may be required to pay a higher corrected assessment in some limited circumstances.

BACKGROUND

You relate that the city of Petersburg conducts real property assessments once a year, normally in April. You believe that once the yearly assessment is complete, the property will not be assessed until the next annual cycle is due in twelve months. You note a situation where a person's real property assessment value was raised eight months into the initial twelve-month assessment period. Further, you report that such person received notification through a supplemental bill from the City's assessor.

Therefore, you seek clarification regarding the authority for such a reassessment prior to the end of the annual assessment period. Specifically, you ask whether such early reassessment would be legal when the locality assesses real property on a twelve-month basis.

APPLICABLE LAW AND DISCUSSION

The power of a local governing body,¹ unlike that of the General Assembly, “must be exercised pursuant to an express grant”² because the powers of a locality “are limited to those conferred expressly or by necessary implication.”³ “If the power cannot be found, the inquiry is at an end.”³ The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are delegated powers.⁴ Therefore, any doubt as to the existence of power must be resolved against the locality.⁵

Chapter 32 of Title 58.1, §§ 58.1-3200 through 58.1-3389, comprehensively governs the assessment and reassessment of real estate for local taxation. A general reassessment is a major undertaking, requiring a locality “to ascertain all the real estate in his county or city, as the case may be, and the person to whom the same is chargeable with taxes on that day.”⁶ The general reassessments must determine the fair market value of the property.⁷

The General Assembly has provided some flexibility to localities with respect to the frequency of reassessments.⁸ Section 58.1-3250 provides the default rule for the general reassessment cycle for cities as every two years. For counties, the default cycle is every four years.⁹ Section 58.1-3253(B), however, provides that cities and counties may adopt an ordinance that provides for an annual assessment.

Consistent with this flexibility, the General Assembly has also authorized the governing body of a locality to direct a reassessment in any given year. Section 58.1-3254 provides, in pertinent part, that:

Notwithstanding any other provision of [Article 5]^[10] to the contrary, there may be a general reassessment of real estate in any county or city in any year if the governing body so directs by a majority of all the members thereof, by a recorded ye and nay vote.

This provision does not authorize multiple general reassessments in a particular year. Rather, there may be “a” singular, general reassessment in any year, provided that the governing body so directs by majority vote. The plain import of § 58.1-3254 is to permit cities and counties that do not conduct a general reassessment on an annual basis to disrupt the two-year, four-year, or other cycle and allow for a general reassessment to occur. The General Assembly does not contemplate or permit a general reassessment more frequently than once per year.

Although a locality is limited in its ability to conduct a general reassessment in any one year, an individual taxpayer may find his property reassessed at a higher value in some limited circumstances.¹¹ One of those situations¹² involves action by a board of equalization¹¹ that results in a higher assessment.¹² Another situation that may result in an increased assessment prior to the general¹³ reassessment cycle involves the correction of a factual or clerical error in an assessment.¹³

CONCLUSION

Accordingly, it is my opinion that the General Assembly has not authorized a city to conduct more than one general reassessment of real property in any one year. A taxpayer, however, may be required to pay a higher corrected assessment in some limited circumstances.

¹Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

²Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975) (noting corollary to Dillon Rule).

³Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

⁴See Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 504-05, 522 S.E.2d 610, 613-14 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act and may include optional provisions contained in act); Op. Va. Att'y Gen: 2002 at 77, 78; 1974-75 at 403, 405.

⁵2A EUGENE MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS § 10.19, at 369 (3d ed. 1996); see also Op. Va. Att'y Gen.: 2002 at 83, 84; 2000 at 75, 76.

⁶See VA. CODE ANN. § 58.1-3281 (2009).

⁷See § 58.1-3201 (2009).

⁸See §§ 58.1-3250 to 58.1-3261 (2009).

⁹See § 58.1-3252.

¹⁰Article 5, Chapter 32 of Title 58.1, §§ 58.1-3250 to 58.1-3261 governs the reassessment and assessment cycles in the Commonwealth.

¹¹See § 58.1-3370(A) (2009) (requiring appointment of board of equalization following general reassessment unless locality has permanent board).

¹²See §§ 58.1-3379(A), 58.1-3381(A) (2009) (providing that board of equalization may increase assessments); § 58.1-3385 (2009) (providing that commissioner of revenue may make supplemental assessment based on action of board of equalization).

¹³See § 58.1-3981 (2009) (allowing for correction of erroneous assessments).

OP. NO. 10-084

WATERS OF THE STATE, PORTS AND HARBORS: STATE WATER CONTROL LAW – REGULATION OF SEWAGE DISCHARGES

ADMINISTRATION OF GOVERNMENT: ADMINISTRATIVE PROCESS ACT – CASE DECISIONS

Two Virginia Pollution Abatement permits issued by the State Water Control Board to land apply sewage sludge are valid.

Unless an agency's decision is stayed or reversed as provided by law, or if it is not properly appealed, the decision remains in effect

THE HONORABLE JILL H. VOGEL
MEMBER, SENATE OF VIRGINIA
OCTOBER 29, 2010

ISSUE PRESENTED

You ask whether three Virginia Pollution Abatement permits recently issued by the State Water Control Board (the “Board”) are valid.

RESPONSE

It is my opinion that one permit is valid and not subject to appeal. The other two are being appealed as to one clause; unless the court should stay, suspend, or set aside one or both of these permits as to that clause, each remains valid and enforceable.

BACKGROUND

At its June 21-22, 2010 meeting, the Board considered applications from Recyc Systems, Inc. (“Recyc”), Synagro Technologies, Inc. (“Synagro”), and Nutri-Blend, Inc. (“Nutri-Blend”) for Virginia Pollution Abatement Permits to land apply sewage sludge. On June 22, 2010, the Board voted to issue the permits.

In each case, the Board adopted findings¹ that concluded

[T]he permit has been prepared in conformance with all applicable statutes, regulations and agency practices;

[T]he limits and conditions in the permit have been established to ensure that pollutant management and land application is performed in a manner that will protect public health and the environment and that the escape, flow or discharge of pollutants into state waters is prevented; and

[A]ll public comments relevant to the permit have been considered.

Recyc and Synagro filed timely appeals.² No notice of appeal of the Nutri-Blend permit has been received by the Board, and no petition for appeal has been filed.

The pending appeals challenge a provision the Board added to each draft permit that requires the permittee to notify the Board if the land to which sludge has been applied is sold within the 38-month period during which food crops with subsurface harvested parts may not be harvested from land where certain sludges have been applied.³ These appeals do not otherwise challenge the validity of the permits.

APPLICABLE LAW AND DISCUSSION

Section 62.1-44.19:3(A)(3) provides:

No person shall contract or propose to contract, with the owner of a sewage treatment works, to land apply, market or distribute sewage sludge in the Commonwealth, nor shall any person land apply, market or distribute sewage sludge in the Commonwealth without a current Virginia Pollution Abatement Permit authorizing land application, marketing or distribution of sewage sludge and specifying the location or locations, and the terms and conditions of such land application, marketing or distribution. The permit application shall not be complete

unless it includes the landowner's written consent to apply sewage sludge on his property.

Section 62.1-44.19:3(B) requires the Board, with the assistance of the Department of Conservation and Recreation and the Department of Health, to adopt regulations to ensure that:

(i) sewage sludge permitted for land application ... is properly treated or stabilized; (ii) land application ... of sewage sludge is performed in a manner that will protect public health and the environment; and (iii) the escape, flow or discharge of sewage sludge into state waters, in a manner that would cause pollution of state waters ... shall be prevented.

Section 62.1-44.19:3(C) further requires that those regulations include, among other things,

3. Standards for treatment or stabilization of sewage sludge prior to land application, marketing or distribution;
4. Requirements for determining the suitability of land application sites and facilities used in land application, marketing or distribution of sewage sludge;
5. Required procedures for land application, marketing, and distribution of sewage sludge;
6. Requirements for sampling, analysis, recordkeeping, and reporting in connection with land application, marketing, and distribution of sewage sludge;
7. Provisions for notification of local governing bodies . . . ;
8. Requirements for site-specific nutrient management plans, which shall be developed by persons certified in accordance with § 10.1-104.2 prior to land application for all sites where sewage sludge is land applied, and approved by the Department of Conservation and Recreation prior to permit issuance under specific conditions; . . .
10. Procedures for receiving and responding to public comments on applications for permits and for permit amendments authorizing land application at additional sites.

The current regulations are codified at § 25-32-310 *et seq.* of Title 9 of the *Virginia Administrative Code*.⁴ The Board now is considering proposed amendments to those regulations,⁵ and citizens may participate in the public comment process under the Administrative Process Act.⁶

Section 2.2-4001 of the *Virginia Code* defines "case decision" as "any agency proceeding or determination that ... a named party ... is ... in compliance with any existing requirement for obtaining or retaining a license or other right or benefit." The Board's June 22, 2010 findings and permit issuance constitute a case decision. Case decisions may be appealed by any "party aggrieved," provided such appeals are taken "in the

manner provided by the rules of the Supreme Court of Virginia.”⁷ Supreme Court Rule 2A:2 requires a party appealing a case decision to file a notice of appeal within thirty days of notice of the decision; Rule 2A:4 requires a petition for appeal to be filed within thirty days of filing of the notice of appeal. These filing deadlines are mandatory and jurisdictional.⁸

Section 2.2-4028 provides:

When judicial review is instituted or is about to be, the agency concerned may, on request of any party or its own motion, postpone the effective date of the regulation or decision involved where it deems that justice so requires. Otherwise the court may, on proper application ..., issue all necessary and appropriate process to postpone the effective dates or preserve existing status or rights pending conclusion of the review proceedings if the court finds the same to be required to prevent immediate, unavoidable, and irreparable injury and that the issues of law or fact presented are not only substantial but that there is probable cause for it to anticipate a likelihood of reversible error in accordance with § 2.2-4027. Actions by the court may include (i) the stay of operation of agency decisions of an injunctive nature or those requiring the payment of money or suspending or revoking a license or other benefit and (ii) continuation of previous licenses in effect until timely applications for renewal are duly determined by the agency.

Section 2.2-4029 provides:

Unless an error of law as defined in § 2.2-4027 appears, the court shall dismiss the review action or affirm the agency regulation or decision. Otherwise, it may compel agency action unlawfully and arbitrarily withheld or unreasonably delayed except that the court shall not itself undertake to supply agency action committed by the basic law to the agency. Where a regulation or case decision is found by the court not to be in accordance with law under § 2.2-4027, the court shall suspend or set it aside and remand the matter to the agency for further proceedings, if any, as the court may permit or direct in accordance with law.

The permits in question were subject to appeal under the Administrative Process Act by a party aggrieved. In the course of an appeal, the court could issue a stay or could suspend or set aside the permit. The court has taken no such action in the instant cases. As such, as regards the Recyc and Synagro permits, unless the Board’s decision is stayed as provided in § 2.2-4028 or reversed as provided by § 2.2-4029, that decision remains in effect and the permits remain in effect and enforceable.⁹ The Nutri-Blend permit, on the other hand, is a final decision of the Board with no timely appeal taken: the permit is valid by its terms until it expires or until Nutri-Blend might surrender it.

CONCLUSION

Accordingly, it is my opinion that the Nutri-Blend permit is valid and not subject to appeal; and that, unless the court should stay, suspend, or set aside one or both of the other permits, each remains valid and enforceable.

¹ See Minutes of the State Water Control Board, June 21-22, 2010, *available at*

http://townhall.virginia.gov/L/GetFile.cfm?File=E:\townhall\docroot\Meeting\103\14194\Minutes_DEQ_14194_v1.pdf.

² *Recyc Sys., Inc v. State Water Control Bd.*, No. CL10000401-00 (Cir Ct. Culpeper Co., filed Aug. 19, 2010); *Synagro Technologies, Inc. v. State Water Control Bd.*, No. CL10000415-00 (Cir. Ct. Culpeper Co., filed Aug. 26, 2010).

³ See 9 VA. ADMIN. CODE § 25-32-620 (regulation restricting access to agricultural lands where biosolids have been applied to the soil, the longest waiting period being that “food crops with subsurface harvested parts shall not be harvested for 38 months following application”).

⁴ The Office of the Attorney General historically has declined to render official opinions when the request involves a question of fact rather than one of law. See, e.g., 2002 Op. Va. Att’y Gen. 64, 66; 1997 Op. Va. Att’y Gen. 1, 3, and prior opinions cited therein. The determination of whether specific permits issued by the Board conform to the Board’s regulation is a factual one that is beyond the scope of an official opinion of the Attorney General. Furthermore, this Office has declined to issue an opinion concerning a matter currently in litigation. See, e.g., 2009 Op. Va. Att’y Gen. 138, 140. Consequently, I express no opinion here as to whether these permits in fact conform to the Board’s regulation.

⁵ See Proposed Amendment to Virginia Pollution Abatement Permit Regulation, *available at*

<http://townhall.virginia.gov/L/viewstage.cfm?stageid=5374>.

⁶ See VA. CODE ANN. § 2.2-4007.03 (2008).

⁷ Section 2.2-4026.

⁸ See *Mayo v. Dep’t of Commerce*, 4 Va. App. 520, 522-23, 358 S.E.2d 759, 761 (1987) (timely petition for appeal is jurisdictional).

⁹ I note, however, that only the notice provisions that are on appeal could be stayed or reversed; the remaining provisions of these permits are valid and enforceable.

OP. NO. 10-102

WATERS OF THE STATE, PORTS AND HARBORS: STATE WATER CONTROL LAW – REGULATION OF SEWAGE DISCHARGES

Any permit issued by the State Water Control Board for land application of sewage sludge must be in compliance with applicable statutory requirements.

THE HONORABLE C. TODD GILBERT
MEMBER, HOUSE OF DELEGATES
OCTOBER 29, 2010

ISSUE PRESENTED

You ask whether permits issued by the State Water Control Board (the “Board”) for land application of sewage sludge must be in compliance with applicable requirements of § 62.1-44.19:3.¹

RESPONSE

It is my opinion that any permit issued by the Board for land application of sewage sludge must be in compliance with the applicable requirements of § 62.1-44.19:3.

APPLICABLE LAW AND DISCUSSION

Section 62.1-44.19:3(A)(1)² requires a permit from the Board for the owner of a sewage treatment works to land apply, market or distribute sewage sludge. Section 62.1-44.19:3(A)(3)³ similarly requires a permit to land apply, market or distribute sewage sludge under contract with the owner of a sewage treatment works. Other portions of the statute, among other provisions, specify requirements for the permits, authorize the Board to adopt regulations, and require notice to local governments.

The Board is an agency, created by statute in the Executive Department of the Commonwealth.⁴ It is elementary that “administrative agencies, in the exercise of their powers, may validly act only within the authority conferred upon them by statutes vesting power in them.”⁵ Thus, it follows without question that the Board must act in compliance with its authorizing statute, in this case § 62.1-44.19:3.

CONCLUSION

Accordingly, it is my opinion that any permit issued by the Board for land application of sewage sludge must be in compliance with the applicable requirements of § 62.1-44.19:3.

¹ VA. CODE ANN. § 62.1-44.19:3 (Supp. 2010).

² See § 62.1-44.19:3(A)(1) (“No owner of a sewage treatment works shall land apply, market or distribute sewage sludge from such treatment works except in compliance with a valid Virginia Pollutant Discharge Elimination System Permit or valid Virginia Pollution Abatement Permit.”).

³ See § 62.1-44.19:3(A)(3) (“No person shall contract or propose to contract, with the owner of a sewage treatment works, to land apply, market or distribute sewage sludge in the Commonwealth, nor shall any person land apply, market or distribute sewage sludge in the Commonwealth without a current Virginia Pollution Abatement Permit authorizing land application, marketing or distribution of sewage sludge and specifying the location or locations, and the terms and conditions of such land application, marketing or distribution.”).

⁴ See § 62.1-44.7 (2006). See also VA. CODE ANN. §§ 10.1-1183 & 10.1-1184 (2006 & Supp. 2010) (creating the Department of Environmental Quality, consolidating the Board into that department, and continuing the Board).

⁵ *Sydnor Pump & Well Co. v. Taylor*, 201 Va. 311, 316, 110 S.E.2d 525, 529 (1959) (setting aside an order of the State Corporation Commission as exceeding its statutory authority).

OP. NO. 09-097

WELFARE (SOCIAL SERVICES): CHILD ABUSE AND NEGLECT – COMPLAINTS

Advocates in domestic violence shelters and sexual assault crisis centers generally are not statutorily mandated to report child abuse and neglect; when such advocate performs activities that would place him under category in § 63.2-1509(A), then he would be subject to requirement to report suspected child abuse or neglect.

THE HONORABLE G. MANOLI LOUPASSI
MEMBER, HOUSE OF DELEGATES
JANUARY 5, 2010

ISSUE PRESENTED

You ask concerning advocates working in domestic violence shelters or sexual assault crisis centers, who are subject to § 63.2-104.1, and whether § 63.2-1509 mandates such persons to report child abuse and neglect.

RESPONSE

It is my opinion that advocates in domestic violence shelters and sexual assault crisis centers generally are not statutorily mandated to report child abuse and neglect. However, when such an advocate performs activities that would place him under any of the categories in § 63.2-1509(A), he would be required to report suspected child abuse or neglect.

BACKGROUND

You relate three specific hypothetical situations¹ concerning the application of § 63.2-1509. In each of these hypothetical fact scenarios, the shelter or center does not assume the care, custody, or control of the child. Also, you report that the advocate is not a mental health professional or other person enumerated in § 63.2-1509(A)(1)-(9) or a person who has received the training described in § 63.2-1509(A)(13). The distinguishing facts in each hypothetical you present are related to the type of contact the child has with the center or shelter and the nature of the service provided to the parent or child.

APPLICABLE LAW AND DISCUSSION

Section 63.2-1509(A) requires that

persons, who in their professional or official capacity, have reason to suspect that a child is an abused or neglected child, shall report the matter immediately to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred or to the [State Department of Social Services'] toll-free child abuse and neglect hotline[.]

Further, § 63.2-1509(A) lists the persons who are mandated to report such abuse and neglect:

1. Any person licensed to practice medicine or any of the healing arts;
2. Any hospital resident or intern, and any person employed in the nursing profession;
3. Any person employed as a social worker;
4. Any probation officer;

5. Any teacher or other person employed in a public or private school, kindergarten or nursery school;

6. Any person providing full-time or part-time child care for pay on a regularly planned basis;

7. Any mental health professional;

8. Any law-enforcement officer or animal control officer;

9. Any mediator eligible to receive court referrals pursuant to § 8.01-576.8;

10. Any professional staff person, not previously enumerated, employed by a private or state-operated hospital, institution or facility to which children have been committed or where children have been placed for care and treatment;

11. Any person associated with or employed by any private organization responsible for the care, custody or control of children;

12. Any person who is designated a court-appointed special advocate pursuant to Article 5 (§ 9.1-151 et seq.) of Chapter 1 of Title 9.1;

13. Any person, over the age of 18 years, who has received training approved by the Department of Social Services for the purposes of recognizing and reporting child abuse and neglect;

14. Any person employed by a local department as defined in § 63.2-100 who determines eligibility for public assistance; and

15. Any emergency medical services personnel certified by the Board of Health pursuant to § 32.1-111.5, unless such personnel immediately reports the matter directly to the attending physician at the hospital to which the child is transported, who shall make such report forthwith.

Only the persons enumerated in § 63.2-1509(A) have an affirmative statutory duty to report suspected child abuse and neglect. I note that in addition to the affirmative duty placed on some persons to report suspected child abuse or neglect, “[a]ny person who suspects that a child is an abused or neglected child may make a complaint concerning such child.”²

Therefore, based upon the facts in the hypothetical scenarios you present, advocates in domestic violence shelters or sexual assault crisis centers generally are not statutorily mandated to reporter child abuse and neglect. However, should the duties of an advocate in a domestic violence shelter or sexual assault crisis center place the advocate into one of the categories enumerated in § 63.2-1509, then such advocate would have an affirmative duty to report any suspected child abuse or neglect.

CONCLUSION

Accordingly, it is my opinion that advocates in domestic violence shelters and sexual assault crisis centers generally are not statutorily mandated to report child abuse and neglect. However, when such an advocate performs activities that would place him under any of the categories in § 63.2-1509(A), he would be required to report suspected child abuse or neglect.

¹For purposes of this opinion, I base my conclusions solely on the hypothetical facts that you present. Should any of the facts change, the conclusion of the opinion also may change.

²VA. CODE ANN. § 63.2-1510 (2007).

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